J. Clark

VOLUME I

TRANSCRIPT OF RECORD

Office - Supreme Court, U.S.
FILED
JUN 28 1954
HAROLD B. WILLEY, Clerk

* * * \

I N D E X

VOLUME NO. I

	PAGE NO.
Caption	1
Complaint	2
Answer	3
Motion and Order to be made Counsel of record	4
Case called, hearing and continuance	5
Further hearing and continuance	5
Further hearing and submission	6
Proceedings	
Dr. Jose Garcia Oller	7
Mrs. Eddie V. Cooksey	45
Clelie Mall	48
John F. Buckley	49
Bernard W. Foster, Jr.	54
Elie J. Boudoin	76
E. A. Jimison	134
Dr. Howard H. Karr	163
Clyde E. Biggers	206
Hugh Flattery	223

* * * * *
* * * *
* * *
* *
*

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

* * * * * * * * * * * * * * * * * *

ELIE J. BOUDOIN *

versus *

LYKES BROS. STEAMSHIP CO.INC. *

* * * * * * * * * * * * * * * * * *

No. 3532

Civil Action

A P P E A R A N C E S:

TERRIBERRY, YOUNG, RAULT & CARROLL
Andrew R. Martinez, Esq.,
William E. Wright, Esq.,
Attorneys for Defendant - Appellant - Appellee

Raymond H. Kierr, Esq.,
Samuel C. Gainsburgh, Esq.,
Attorneys for Plaintiff - Appellee - Appellant

...oOo...

APPEAL from the District Court of the United States for the Eastern District of Louisiana, to the United States Court of Appeals for the Fifth Circuit, returnable within forty (40) days from the 30th day of June, 1953, at the City of New Orleans, Louisiana.

...oOo...

EXTENSION of time granted by the Honorable United States District Court, Eastern District of Louisiana, bringing the return day up to and including September 28, 1953.

...cOo...

C O M P L A I N T

(Number and title omitted) (Filed: July 14, 1952)

Plaintiff, complaining of the defendant, by his attorney WILLIAM L. STANDARD, respectfully alleges as follows:

FIRST: Upon information and belief, at all times hereinafter mentioned, the defendant was and still is a foreign corporation, duly organized and existing under and by virtue of the laws of the State of Louisiana, engaged in the shipping business, with an office and place of business in the Borough of Manhattan, City and State of New York.

SECOND: At all times hereinafter mentioned, the defendant owned, operated and controlled the S. S. MASON LYKES.

THIRD: At all times hereinafter mentioned, the plaintiff was in the employ of the defendant as an oiler aboard the said S.S. MASON LYKES.

FOURTH: On or about November 25th, 1949, plaintiff was assaulted by a member of the crew, without fault on his part, resulting in severe and permanent personal injuries.

FIFTH: Said injuries, were due to the carelessness, recklessness and negligence of the defendant, its agents, servants and employees, and the failure of the defendant to properly man said vessel with qualified and competent employees.

SIXTH: As a result of the foregoing, the plaintiff was rendered sick, sore, lame and disabled, and sustained serious and severe personal injuries, and was and is internally and externally injured, causing him to suffer

great pain, and for a long time he was and still is prevented from attending to his daily labors, thereby losing large sums of money which he would otherwise have earned as wages, and has expended sums of money in endeavoring to be cured of his injuries aforesaid, and to maintain himself, and has endured and will continue to endure great pain and suffering, all to his damage.

WHEREFORE plaintiff demands judgment against the defendant in the sum of $15,000.00 damages, wages, maintenance and cure, together with the costs and disbursements of this action.

WILLIAM L. STANDARD

BY s/ Edward J. Malament
A Member of the Firm
Attorney for Plaintiff
Office & P. O. Address
No. 38 Park Row
New York, New York

...ooOoo...

A N S W E R

(Number and title omitted) (Filed: February 7, 1952)

Defendant, LYKES BROS. STEAMSHIP CO. INC., answering the complaint herein by its attorneys, Tompkins, Boal & Tompkins, respectfully alleges as follows, on information and belief:

FIRST: It denies each and every allegation contained in Paragraph FIRST of the complaint, except that it admits that it is a corporation organized and existing under the laws of the State of Louisiana.

SECOND: It denies each and every allegation contained

in Paragraphs FOURTH, FIFTH and SIXTH of the complaint.

WHEREFORE, defendant prays that the complaint herein be dismissed with costs, and that it may have such other and further relief as may be proper.

TOMPKINS, BOAL & TOMPKINS

BY (sgd) Arthur W. Boal
Member of Firm
Attorneys for defendant
115 John Street
New Orleans, N.Y.

...ooOoo...

MOTION AND ORDER TO BE MADE COUNSEL OF RECORD

(Number and title omitted) (Filed: Sept. 26, 1952)

Now comes LYKES BROS. STEAMSHIP CO., INC. defendant, and upon suggesting to the Court that the above case was transferred from United States District Court, Southern District of New York, to United States District Court for the Eastern District of Louisiana, and upon further suggesting to the Court that TERRIBERRY, YOUNG, RAULT & CARROLL should be named as counsel of record for defendant, LYKES BROS. STEAMSHIP CO., INC. it is respectfully requested that said attorneys be named as counsel of record.

IT IS ORDERED that TERRIBERRY, YOUNG, RAULT & CARROLL be and they are hereby named as counsel of record for defendant, LYKES BROS. STEAMSHIP CO., INC.

s/ J. SKELLY WRIGHT
United States Judge

New Orleans, Louisiana
September 26, 1952
TERRIBERRY, YOUNG, RAULT & CARROLL

BY: S/ William E. Wright

CASE CALLED, HEARING AND CONTINUANCE

Minute Entry March 19th, 1953 Wright, J:
(Number and title omitted)

This cause was this day called for trial without the intervention of a jury;

Present: Raymond H. Kierr;
Attorney for plaintiff;

Andrew R. Martinez,
William E. Wright,
Attorneys for defendant;

All witnesses were sworn individually.

Witnesses for plaintiff:

Dr. Jose Garcia Oller,
Mrs. Eddie V. Cooksey , makes return to duces tecum
Clelie Mall, makes return to duces tecum
John F. Buckley
Bernard W. Foster
Elie J. Boudoin

and, after hearing evidence and testimony on behalf of the plaintiff, counsel rested with the right to rebuttal;

Witnesses for defendant:

E. J. Jimison

and, after hearing evidence and testimony on behalf of the defendant in part, the matter was continued to Friday, March 20th, 1953 at 2:00 P.M.

...ooOoo...

FURTHER HEARING AND CONTINUANCE

Minute Entry March 20th, 1953 Wright, J:
(Number and title omitted)

This cause as continued from yesterday, was this day resumed.

Defendant's witnesses continued:

Dr. Howard Carr
Clyde Biggers

and, after hearing evidence and testimony on behalf of the defendant in part, the matter was continued to March 21st 1953 at 10:00 a. m.

...ooOoo...

FURTHER HEARING AND SUBMISSION

Minute Entry March 21st, 1953 Wright, J:
(Number and title omitted)

This cause as continued from yesterday, was this day resumed.

The witness, Hugh Flattery, was called to testify and was sworn by the Deputy Clerk.

Counsel for defendant offered in evidence the depositions of Capt. Townsend and Officer Staggers and urged objections to certain parts thereof, which objections, after hearing argument of counsel, the Court took under submission. Counsel announced to the Court that he would rest;

Witness, Harry Beyer, was called and sworn by Deputy Clerk and testified on behalf of plaintiff in rebuttal;

Counsel to have until May 1st, 1953 to file Findings of Fact and Conclusion of Law and Memorandum.

...ooOoo...

P R O C E E D I N G S

Proceedings had before HONORABLE J. SKELLY WRIGHT, Judge, United States District Court for the Eastern District of Louisiana, in the above entitled and numbered cause, on March 19, 20 and 21, 1953, at New Orleans, Louisiana.

A P P E A R A N C E S

Raymond H. Kierr, Esq.
Samuel C. Gainsburgh, Esq.

Attorneys for Plaintiff

Messrs. Terriberry, Young, Rault & Carroll
William E. Wright, Esq.,
Andrew R. Martinez, Esq.,

Attorneys for defendant.

DR. JOSE GARCIA OLLER: Witness, being duly sworn on behalf of plaintiff, was examined and testified as follows:

DIRECT EXAMINATION:

BY MR. KIERR:

Q Please state your name?

A Doctor Jose Garcia Oller.

Q Doctor, you are a qualified practicing physician in the city of New Orleans?

A Yes, sir.

Q Have you a specialty?

A Neurosurgeon.

Q Would you mind stating for the benefit of the record your qualifications for the practice of your specialty?

A I graduated from Jefferson Medical College in Philadelphia, served my interneship at Jefferson Medical Hospital in Philadelphia; completed that interneship and obtained my license from the Board in the State of Pennsylvania. Since then , through 1950, I spent five years in training for the specialty of neurosurgeon, and nothing else for five years.

Q Where did you receive your specialized training?

A Three months in the Institute of Anatomy at Yale University, anatomy of the head and neck; one year in general surgery in Lynchburg, Virginia with a specialty group in general surgery; six months in diagnosis and examination of patients with the disease of nervousness; eighteen months in brain surgery as a Fellow at Ochsner Clinic from 1948 to 1950; six months of specializing in pathology, that is disease of nervousness; six more months in Yale University. Then six more months in neurosurgery, being chief resident at Charity Hospital in New Orleans; in the practice of surgery at Tulane. I obtained my degree from Tulane University as a specialist in neurosurgery after having presented a thesis and being examined; general practice of neurosurgery, limited to neurological surgery since January, 1951. Also enrolled at Tulane University in the function of neurologist, neurophysiologist, which I have completed all ordinary groups, and have hospital appointments necessary for the practice of neurosurgery. At present I am attending surgeon at Charity Hospital; attending neurologist in an independent unit; visiting surgeon at Charity Hospital and Hotel Dieu in New Orleans.

Q Have you received any honorable recognition in the field of professional writing, Doctor?

A I belong to the Alpha Omega Alpha, one of the medical societies to Sigma Chi, the last named which is an honorary research professional society. I have received

special honor. In writings, I have a certificate showing that I presented the best essay on neurosurgery out of all the Fellows of Tulane University, at Ochsner Clinic.

Q Doctor, have you had occasion to examine, Elie Boudoin?

A Yes, on December 24, 1952.

Q He was referred to you for examination and evaluation, was he not?

A Yes.

Q Would you mind giving us the history and findings with regard to your examination?

A Mr. Boudoin complained of headaches and dizziness intermittently, since an injury in November, 1949. The injury was a blow to the head on the right side back of the ear with a glass bottle. Immiediately following this injury patient had rather severe headaches, which might be expected, and bleeding from a lacerated scalp, which might be expected, but headaches did not clear up, but were severe enough to warrant his staying in bed for at least fifteen days, from the hospital record I have here, for a period of three weeks to a month. The patient says he was bedridden because of the severe headaches. A person who is hit over the head and maintains headaches that keep him in bed a month or three weeks, I would think he received a head injury that was severe enough to put him in the hospital. Most people would recover from a minor head injury, but as he stayed in bed for three weeks, I would say that shows indications of cerebral injury. Since then the headaches are intermittent.

The patient complains of constant headaches. Mr. Boudoin gets along well for a period of time and then he gets severe headaches that last two or three weeks. We find no organic headaches. He was symptoms of vertigo. If a person has a feeling of unsteadiness, or swaying, it is due to the injury to the cerebral hemisphere over the back of the head, the cerebellum. The significance of evaluating the complaint of vertigo is the most common symptom of injury to the cerebellum, the back of the head and ear. On examining Mr. Boudoin we found a scar over the mastoid, showing his injury back of the skull, and the symptom we found was specifically vertigo, so we go along with that finding. In fact, he had a blow back of the head instead of the front, and the symptoms go along with that.

It is significant he complained of nothing else but headaches and dizziness. In fact, the patieht brought out he had excessive headaches when in hot surroundings. Mr. Boudoin says he can't go to sea because of his illness, so we have the symptom that seems to go along with post-traumatic headaches and posttraumatic vertigo.

Ordinarily, we don't have neurological signs that long after an injury. When we do find specific organic neurological signs, we consider that a serious headache. In other words, some of those phases clear up in two or three years. Only those who do not clear up, have neurological signs. When I examined Mr. Boudoin, I was faced with neurological signs that could not be simulated unquestionably

brain disease. These signs are essential. The scar on the back of the head would indicate injury to the cerebellum, some part of the brain on the right side. There are two signs. Nystagmus, which means oscillation of the eyeballs, a movement uncertain of duration.

Now the reason I say that in this case is specific, because it is a question of nystagmus associated with the injury to the right side of the cerebellum, because this movement of the eyeball does not occur when the patient looks to the left, but only when the patient looks to the right or up. When the osciallation of the eyeball occurs just to one side, it means lesions to the cerebellum on the right side of the nervous system, such as would be due to an injury to the back of the skull on the right side.

The oscillation of the eyeball can be due to several diseases, but the kind of oscillation of the eyeball Mr. Boudoin has is due to the vestibulocerebral disease on the right side. It rules out such things as drugs, congenital disease, other brain diseases. The oscillation is not specifically due to the cerebellum. It has a clasa component looking to the right and slowly returning as he relaxes. As the patient looks to the right, he jerks slowly and returns to position.

He also has the Babinski sign. Mr. Boudoin has this socalled Babinski sign -- named after a French neurologist at the turn of the Century -- on the left side, the left lower extremities of the left foot. With an injury to the

right side of the cerebellum, we expect a possible Babinski sign on the opposite side of the cerebellum, which controls the left foot. On the other hand we expect oscillation of the eyeballs on the right side. That is what Mr. Boudoin shows, left Babinski and right oscillation of the eyeball. That is a mechanical sign that points to a lesion in the same general location as the nystagmus would place it. If he had a Babinski on the right side, it wouldn't be helpful.

Mr. Boudoin has asymmetry which may or may not be due to the injury. He has a flatness of the groove, nose and chin, flattening of the nasolabial full to the side of the mouth. If you look at Mr. Boudoin you will notice that the lip on the left side sags down, that the groove between the nose and the lip on the left side is flat.

Q Can you demonstrate that on the patient, if he stood up there?

A Yes. (Doctor illustrating on Mr. Boudoin). You will notice this side of the lip is higher than this side. There is a little puffing out at the side of the lip, and the grooved side of the nose to the outside of the lip on the right side.

On the left side that is obliterated. That is due to the fact the muscles on this side of the face and lip have lost tension. It is sometimes partial paralysis which we find after being struck on the head and receiving an injury.

I have some slides in my record showing the flattening of the left side of the face due to an injury of long standing, showing loss of tone. That would signify a facial weakness due to injury, but unfortunately we cannot be sure in this case, because it doesn't tell us that by the oscillation of the eyeball or by the Babinski, that it was necessarily a right side injury. This may be due to the left or right side, but those are the things we look for in a brain injury patient.

Q Doctor, could you show us the left rear portion of the head which you described technically as the site of the scars?

A We can see that there is an injury to the back of the skull over to the mastoid and back to the cerebellum, the contrary movements of the eye. If he had a blow up here, (indicating), it would not be related to the injury he has, so that is localized pretty well.

Q Is there a complicated routine to make a test for nystagmus?

A No, very simple.

Q Could you demonstrate it?

A In looking to the left the eyeball was pretty steady. Looking to the right there is a quick jerking to his left side and slow returning to the left. Looking to this side, the eyeball is pretty steady. We find a faint oscillation. As we go over here there is a rapid movement to the right, with a gross oscillation as you look to the right, and look over here. (Indicating). I don't know whether

you can see it or not. It is rapid to the right and slow return to the left. On the basis of that, it was my feeling that here we had an injury, with severe headaches, with three weeks bedridden and scars and neurological findings three years after the injury, I felt I was not positive that this was necessarily due to the injury until I studied the patient further.

Here we have a man we will say with a brain tumor, or could have another disease like multiple sclerosis, which is a very common disease --

Q What, if anything, was done to rule out syphilis?

A I felt it was necessary, before I could give an opinion, to determine whether there was evidence of multiple sclerosis or syphilis, or a brain tumor. A brain wave was done to get the information, which is usual long after an injury, unless an epileptic. I decided on x-rays and examination of the spinal fluid, which would show evidence of syphilis in various tests, also gave the colloidal gold test. Those three tests will demonstrate whether there is syphilis, and they were perfectly normal. The next test was the depressor test. If the patient had a tumor, the pressure would be increased. The pressure was perfectly normal.

In this case, so far as I can determine from my study, I can find no other disease that could be responsible for his condition. On the basis of that I feel his symptoms are justified, and what we can expect from that kind of injury.

Q Did you have occasion, Doctor, to examine the findings of the electroencephalogram?

A Yes, I examined the electroencephalogram, and Dr. Posey examined the electroencephalogram.

OBJECTION: MR. WRIGHT:

I would like to make an objection to anything that Dr. Posey may have concluded, except for the finding of his electroencephalogram.

BY THE COURT:

Q Can you give the testimony, restricting yourself to the findings of the electroencephalogram?

A Yes. The electroencephalogram was normal.

BY MR. KIERR:

Q Would you tell us whether or not that was consistent with the opinions which you have expressed?

A Yes.

THE COURT:

The Doctor has already testified to that.

BY MR. KIERR:

Q Have you had an opportunity to examine the records of the Marine Hospital?

A Not extensively, but I looked at them.

Q Would you say that the diagnosis made by the Marine Hospital, or U. S. Public Service Hospital relative to post concussion syndrome, is consistent with your opinion?

A Well, in medicine we have labels for diseases we call syndrome. Post-concussion syndrome is a common term to

express symptoms from headaches and dizziness after an injury to the brain. Now the concussion part of it I am not happy with, because concussion in a specialist's mind is considered headaches. We do not know exactly what the concussion is. Concussion, in my definition, is a shaking up of the brain, injury to the brain, but one can have extensive bruising, contusion, or laceration of the brain. Of course, concussion syndromes refer to headaches and dizziness, and with that information, that is the way I know it.

Q Did you find any evidence of injury to the nerves, superficially or otherwise, at or near the site of his injury?

A Yes. It is common to find after laceration of the scalp that the sensation around those scars is not normal. The scar itself is sensative. That combination is present in Mr. Boudoin.

Q Could you evaluate your diagnosis in terms of the effect it would have upon his ability to perform manual work, such as in the engine department of a steamship?

A That is always difficult. Mr. Boudoin's strength is good; his coordination is good, so he would be able to do ordinary physical labor, except for a few things. We find in a patient who has had a brain injury of this nature, that changes of position will bring on dizziness. As you noticed here, the eye starts oscillating and the patient gets dizzy. Second, overheating. If the patient works in the

sunlight or hot surroundings for any length of time he may become incapacitated. A lot depends upon his equilibrium. The equilibrium of a person has a lot to do with his ability to fix and orient himself. When he wanted to look to the side, or up, he would be inclined to lose his balance, and therefore, by going to sea he will suffer more dizziness. I would say that is the extent of the incapacity, as I see it.

Q It would not incapacitate him for less demanding labor of a more ordinary type?

A No indeed. I certainly think he could do that.

Q Did you have occasion to have x-rays taken, Doctor?

A I ordered and studied the x-rays at Hotel Dieu, and I found them to be normal.

Q You say you studied them. You mean you personally studied them?

A Yes.

Q How long was he in the hospital for other tests?

A He was at the Charity Hospital -- I can't be positive-- but no longer than thirty-six hours; two hospital tests, is my impression; the tenth of January, and the next day the report was negative. I suppose he was there no longer than thirty-six hours. I can't be positive.

Q Doctor, if I inform you that the official log book of the vessel upon which he was injured, shows that following his injury and treatment on November 25, 1949 he was confined to his quarters with some twelve or fourteen stitches in the scars, and on November 26, 1949 a doctor

aboard the vessel changed the dressing, and that on November twenty-eighth, x-rays taken ashore were negative to the extent they showed no signs of a fractured skull; that on December second this passenger doctor removed the stiches from the scalp, and Mr. Boudoin was getting a total of six codeine tablets at intervals to ease headaches, and that when the entry was made on December twelfth, 1949, the ship master observed that Mr. Boudoin was still relieved from his duties, suffering from occasional headaches and dizziness, would you say those entries are, or are not, consistent with your opinion?

A I would say they are.

Q Have you had a chance to review that hospital record again, Doctor? I realize I may be pressing you for time, but I didn't have it available until this morning. Will you hastily look at that and see if any significance in it?

A No. The history seems to agree with what I received from Mr. Boudoin personally, which is the main thing I was interested in. You have to be sure what the record is regarding his history. Sometimes one doesn't get an accurate history. I don't know that I could evaluate on this record. There might be a lot of things here I don't agree with. Their findings negative as to spinal fluid; lumbar puncture, opening pressure 100 mm, which is normal, Fluid was clear. In other words, their findings were the same as my examination.

The test of the spinal fluid at the Marine Hospital on

February 2, 1950 is negative, which means that here again we do not have evidence of syphilis; that the cell count was normal; that the globule was not increased, and the neurological findings were the same. We have here the additional information that the spinal fluid findings do not show any associated diseases, syphilis, multiple sclerosis, or tumor.

Q If the fluid pressure was normal, and the blood cells in the fluid --

A There were two red cell counts, but they were normal.

Q If the blood cells were not of abnormal count, and those findings were had that date, or at a relatively recent time following the injury, would that or would that not be the conclusion which you have expressed?

A No, sir.

Q How would you express those spinal fluid signs?

A The fact that the spinal fluid was normal at this date, 1950, is the ordinary finding.

Q Is it possible for a man to have sustained a head or brain injury, such as you have described, and have these normal findings on that date?

A That is the usual finding.

Q I believe you said in your report that the injury which you believe to exist is irreversible. What does that mean?

A It means three years after the injury, the patient has objective organic neurological signs, which means there is no reasonable hope that it will ever disappear. That means

that part of the brain has been permanently damaged. In this case that means the cerebellum has a permanent brain injury.

Q Would you please answer Mr. Wright's questions?

A Yes.

CROSS EXAMINATION:

BY MR. WRIGHT:

Q Doctor, with reference to the various tests made at the Marine Hospital, and also by you, I notice that you concluded that the man was not suffering from some type of disease at the central nervous system. Didn't those same tests also indicate that he was not suffering from brain damage at all?

A No. It does not indicate that at all. I believe the fact that the spinal fluid is normal, is what you would expect with a head injury. A head injury is the swelling of the brain and a certain amount of bleeding. Right after a head injury you may find some blood in the spinal fluid. Within ten or fourteen days, it is perfectly normal, unless complications ensue, like infection.

Q When there is a serious fracture of the skull?

A There is no serious fracture of the skull.

Q I realize that, but in a case where there is a crushing injury to the skull, isn't it the normal routine for doctors to take spinal tests to determine, or associate it with the fracture of the skull?

A I would say no. I would say that would be a fairly normal routine. When we are treating patients for skull

fractures, with a head injury, the skull fracture is incidental. We don't particularly worry whether the patient has one or ten fractures. The important thing is whether his brain is injured. I saw many serious head injuries that the patient has died from, due to brain injury. The brain inside is like jelly. In the socalled pressure injury in the skull, we treat the skull fracture to prevent infection, later epilepsy, due to pressure on the brain. There would be no necessity to see what the spinal fluid showed unless you expect brain injury, showing infection by high fever, showing signs of infection. In a head injury we rush the patient to the operating room and take care of the skull injury. I don't take x-rays of the skull, because I don't think it necessary.

Q In an injury to the brain, you wouldn't find bloody spinal fluid?

A Yes, but it would clear up in two weeks. Of course, this was done sometime later.

Q It would clear up in two weeks regardless of the extent of the injury?

A Absolutely. In other words, if you had a mass hemorrhage within two weeks it would clear up. Nature is wonderful.

Q In testing to determine whether or not the patient has a brain injury, aren't there about six or seven standard procedures to be followed?

A I have no idea what you are talking about.

Q Referring to the medical books I have read called the

criteria to determine whether or not there is brain injury, I was interested in knowing whether or not the standard --

A The presence of abnormal neurological signs, that the brain doesn't work, because there is a paralysis or paraphia. The things mentioned here before are ulterior in the emotions stated by the patient. When you say six or seven criteria present --

Q I didn't mean to say six or seven had to be present --

A I say for practical scientific purposes, there are two important criteria.

Q What part does unconsciousness play in whether or not someone has such trauma?

A The patient has a sustain a head injury.

Q Is the lack of consciousness sufficient to indicate the patient did not sustain brain damage?

A No indeed. We have lots of patients who die from brain injury, who were not unconscious. They may have been unconscious two months later showing there may be severe damage to the brain. We also have patients who develop epilepsy two or three years after. In this particular case, the part of the brain I recognize to be injured on Mr. Boudoin, has nothing to do with consciousness. It has to do with equilibrium, as I mentioned, of the eye, and the Babinski test. Those have nothing to do with consciousness, and we have found injury to the back of the brain and the patient was not unconscious.

Q- Isn't that a very minority finding?

A You mean statistically?

Q Yes?

A Statistic injuries to the cerebellum are few and far between, so I say statistically it is rare in headaches. I see an average of twenty head injuries a month. I may see in the course of a year 250 head injuries, and I may see five cerebral injuries.

Q Along with the numerous other criteria, such as the existence or nonexistence immediately following the trauma of bloody spinal fluid, bleeding from the nose and ears, would that also be indicative of whether or not the patient sustained brain damage?

A I disagree with that. Those things are practically obvious which we find, and most of our patients should recover who do not have brain damage, as bleeding from the nose and ears, so I cannot agree with you that it indicates cerebral injury. It indicates there has been a fracture to the middle ear. That is not commonly associated with brain injury, and again, they are things that we normally see, and they all get well.

Q Those things, in your opinion, would not indicate the severity of the injury?

A I can not make that generalization. I see bleeding from the nose and ears that indicate skull fractures. The patient may have a brain injury. The patient may be walking with bloody spinal fluid. Further, the condition may have cleared. That is one of the important things in medicine, to evaluate each patient individually.

Q What about the significance of knowing the extent of paralysis, injury to the brain?

A We have evidence in Mr. Boudoin; the positive Babinski is a sign of injury to the motor power. Whether he had weakness at the time of injury, I wouldn't know.

Q Is there anything in the Marine Hospital record to indicate there was any sign of paralysis during the period he was there?

A No indeed. I would expect him to have weakness, according to the babinski, on the left side of the body. I would expect, if Mr. Boudoin had been examined by a Neurologist at the time of injury, or within a few days, he would have found weakness on the left side.

Q You mentioned that the face asymmetry could well have been congenital?

A It is possible Mr. Boudoin could have had an injury at birth, or born with a little asymmetry of the face. I cannot say.

Q Did you ask him whether or not he had that disfigurement to his face prior to the trauma?

A I don't recall.

Q You think maybe you did in taking the history?

A Well, I may have. I expect I did. I can't recall. I would suspect I did. I didn't place a great deal of emphasis in his disfigurement. I am not sure he had it before this accident, or at the time he was born, but it is a common sign of brain injury weakness on the opposite side of the face. I am not going to skip it over, but I

can't take any one finding and put too much emphasis on it.

Q I think perhaps some emphasis should be placed on it, since we only have three objective findings. If one of them is congenital, then we have two left?

A I don't think it wise to look at every minute piece of evidence and disprove it, when you have the whole patient to look at.

Q One of your duties was acquiring the history from the patient, wasn't it?

A Oh, yes.

Q I would appreciate it if you would reflect for a moment and determine whether you asked him if he had this disfigurement to his face prior to the trauma in this case?

A I can't remember. I will look at the record and see. (Witness referring to record). I have no record of it.

Q You do have your report of March 9, 1953?

A Oh, yes.

Q Is there any mention in your report of March 9, 1953 as to whether or not you inquired as to his facial disfigurement?

A No. I say weakness of the left side of his face, with flattening of the left nasolabial fold, which may be due to cerebral damage on the right side of the brain stem. I point out it is also possible that it is congenital, and it could have been present before the accident. I did specifically take a history as to whether or not he had

not due to a previous injury, but if due to something else, I don't know.

Q If the patient had told you the facial disfigurement was prior to the trauma, in that case that would have ruled this out completely?

A No. You will find patients who will tell you the right side is paralyzed, and upon examination you find the left side paralyzed. It looks to him like one side is normal and the other side is sagging. He may have been told by friends he had asymmetry on one side of the face, but in my opinion you can't expect the patient to tell you what is wrong with his face. I have patients who have the right eye closed, and patients who have the left eye closed, and when I ask them about it, they say they have been closed all their lives. It is hard to admit they have serious injury to the brain, but when I take the history from the family, you find out a brain tumor has shown up in the last few weeks. I can't say the patient knows or does not know.

Q It is true too that you have to be justly suspicious of statements from the patient with reference to complaints?

A I am not suspicious. I get the history and try to evaluate the condition.

Q According to this nystagmus, I think while looking at the patient in this case, along with Your Honor, you mentioned there is some nystagmus?

A One is normal and one abnormal. There is an intermittin

abnormal nystagmus that is rapid and slow.

Q This nystagmus can be congenital?

A Yes. Patients who are working in the dark have no fixation in the dark; the patients' eyes jerk. Sometimes they are born with it, sometimes due to intoxication, but I wouldn't consider it congenital.

Q It is possible that it could be congenital in this instance?

A I just answered that.

BY THE COURT:

Q It is your opinion that it could not be?

A It is my opinion. I hate to be that positive. I would say it is such that I would not consider it congenital.

BY MR. WRIGHT:

Q It could be?

A If syphilis, or brain tumor.

Q What other diseases?

A You mention them.

Q Arterio syndrome; high blood pressure?

A Mr. Boudoin does not have high blood pressure; vascular diseases of the brain; arteriosclerosis. I must admit I can testify for ages on diseases of the nervous system, but I have cautiously gone over this in my mind, and I don't believe it is related to the diseases of the brain.

Q You don't believe yourself a specialist in internal

and all the things you mentioned relate to the diseases of the brain. These are in the line of my business.

Q Could you state whether or not this asymmetry existed prior to the trauma in this case?

A It could. You realize I can't testify to what happened twenty years ago.

Q Did he mention any eye disability to you when giving you the history?

A No indeed.

Q Did he state that he found any type of trouble with his eyes since this accident, when he gave you the history?

A I don't recall.

Q You mentioned, I believe, in answer to Mr. Kierr, something in reference to losing balance as regards looking to the side?

A Yes.

Q Did he mention anything about that occurring to him, or giving a history of it?

A It is impossible for them to know they have intermitting nystagmus. A patient may have vertigo, due to something in the brain, but actually due to nystagmus, so there was no way Mr. Boudoin could report that to me. It is dizziness. That is all he can report. In other words, when he develops these signs, it is dizziness. He cannot say it is nystagmus , or describe it, because it is not possible for him

is looking forward?

A No.

Q And ordinarily would not cause any dizziness?

A No.

Q Is it only when he puts his eyes extremely to the side?

A Overheating, sudden exertion, sudden turning, and of course, on an unstable boat. Those are the circumstances. If a patient has vertigo, he isn't seaworthy.

Q Did I understand you correctly, Doctor, did you state that the headaches which the plaintiff states he now has, are extremely intermitting, but that in the initial weeks following the accident they were consistent?

A That is correct. After the injury the patient complained of consistent headaches. Then they became intermittent for a period of time, and then would come back.

Q Did you notice when Mr. Kierr read to you the logging from the vessel, that he referred to intermitting headaches?

A Yes. of course, I don't know what -- I don't know that it would make any change in the clinical record whether he had intermitting headaches or continuous headaches.

Q Will you answer my question?

THE COURT:

He said yes, he noticed it.

A Yes.

BY MR. WRIGHT:

Q You say you don't know whether that would make any [illegible] the clinical picture?

Q It wouldn't be indicative of anything?

A Except the patient had headaches sometimes, and other times constant.

Q I think you previously testified that in this condition you would have constant headaches for a few weeks?

A I think I started my testimony, the patient stated he had continuous headaches after the injury which kept him in bed most of the time. I thought it was unusual. Here we had a rather severe and protracted headache. Where the headache is continuous or intermitting right after the injury, it is difficult for us to evaluate, because we don't know what is in the patient's head, because there may be blood. As long as there is blood in the spinal fluid for ten days or two weeks, he has headaches. Long after injury we usually expect intermittent headaches. I never allow a patient to leave the hospital until his headaches have cleared up, because if it doesn't, he is bound to have sequels.

(Five minutes recess).

Q Doctor, did you determine whether or not the claimant was suffering from sclerosis?

A No, I don't remember.

Q Would you tell us what sclerosis is, briefly?

A Yes, curvature of the spine.

Q If you are suffering from sclerosis, would that be indicative of the fact that his facial disfigurement would be congenital?

A Sclerosis is due to many things. Mr. Boudoin jumped off a ship and wrenched his back, according to his past history, in 1947. Whether due to that injury, for which I did not examine Mr. Boudoin, I don't know, but sclerosis is a condition of the spine. That is for an Orthopedic surgeon. I am not an Orthopedic surgeon. I think the testimony is clear that the facial weakness is there, it is objective. I can't say whether it was due to this injury or not, but putting the pieces together, it agrees with his other signs, and location of the scar, and his injury, as I evaluate it. I can't say whether it was there previously, due to congenital.

Q For that matter, you can't say actually from these three signs you mentioned, the nystagmus, the Babinski reflex disability and the facial disfigurement, that they did not exist prior to the time involved in this matter?

A But I did say the neurological findings, the history of the case, the evidence of the trauma, the location back of the skull on the right side. It then becomes a question of say whether or not you accept the fact the scar, the blow, the injury in the neurological findings are located in one place, and there was no other illness before in the exact same place.

Q The fact is, your objective findings were only two in number, and one of them could definitely be congenital in nature --

A Then there could be three.

Q May I finish?

A I am correcting you. There are three.

Q I think you said the facial disfigurement could well be congenital in original?

THE COURT:

He says there are two signs which he definitely attributes to the nystagmus. This other thing he doesn't know.

BY MR. WRIGHT:

Q The fact that you only have two signs at this time doesn't necessarily prove that they did not exist prior to the trauma?

A Let's not minimize the number of signs. The Babinski is an outstanding sign. The nystagmus is an outstanding sign. There are a number of them.

Q Well, could either or both of those signs result, or cause a disturbance of the brain for nervous symptoms. In other words, could those two signs be indicative of the disturbance of the brain, or nervous system, resulting from something else other than trauma?

A There is no question --

Q Can you answer that question yes or no?

A Will you repeat it?

THE COURT:

He wants to know can you attribute the nystagmus, as you found it in this patient, and the Babinski sign, as you found it in this patient, to anything other than this blow on the head?

A Theoretically, yes, but we ruled that out on the examination.

BY MR. WRIGHT:

Q Other than those things you ruled out, which were three in number, can there be other things that could cause these two signs that you found?

A And nothing else?

Q Yes.

A In other words, he doesn't have any of the other signs, but the nystagmus and Babinski, the two signs mentioned. Some have twenty-five signs, some ten and some two. In this patient we find only two signs. I don't think that any other tests, other than the three I have mentioned that would reasonably explain it.

Q The answer is -- the fact of the matter is, however, that these two signs could well be the result of something other than the trauma that is involved in this case?

A It is my opinion that it is not, after thorough study. If I said this was not due to trauma, I would have no study to base it on. After studying the case and figuring it out, having examined the patient and finding nothing else suggestive of other possible diseases, that is my opinion. The theory that possibly this could be the beginning of Hodgkin's disease is like throwing a nickel in a slot machine. It is guess work and I can't give an opinion.

Q You say you conducted other tests, but I believe your testimony is that you relied on three things?

A If you mention a few.

Q I had particularly in mind some things you developed later on in this case?

A Give me the facts and I might be able to help you.

Q Isn't it a fact excessive use of alcohol will cause disturbances to the brain or central nervous system?

A It will not.

Q How about syphilis?

A It will cause it, but he does not have it.

Q How about ear disability causing asymmetry?

A There is tetanus ringing of the ear that is a specific type; tumor of the acoustic nerve that could cause this specific type of nystagmus, but he does not have that.

Q In taking your history from the patient, did you discuss whether or not he drank to excess?

A I don't recall.

Q In other words, you didn't consider that escapade at all?

A No. There are a lot of things we consider which we don't care to discuss with the patient. Some things are obvious.

Q What are you referring to that were obvious?

A In other words, if I felt that alcoholism would explain any of these organic signs.

Q What about his symptoms?

A If it explained any of his signs any of his symptoms, I would have studied the situation of alcoholism a little

closer.

Q If the headaches and dizziness were caused by the excessive use of alcohol, then the two objective findings which you located would not have caused the disability?

A I wouldn't say that. If you have signs of brain injury on one side with headaches and dizziness, with no previous history of head injury, the patient never complained of headaches before the trauma, but does since, sometimes intermitting, then you would say it is probably not due to alcohol. I am not sure that alcohol is a common cause of headaches except the morning after.

Q Assuming that we will show in this case that this man was guilty of the excessive use of alcohol prior to the trauma, he had headaches and dizziness?

A No. If his headache is chronic, if I learn that as a fact, then the medical information in this case, is that the patient who has a past history of alcoholism, is much more susceptible to trauma.

Q In those cases you found objective signs of the injury, such as unconsciousness?

A I think we have gone over that and I said that is not true.

Q Not true in alcoholism?

A Not true in any injury. If you run 500 patients, the ones that get disability post-traumatic bleeding in the brain are more common than the others. One may have a mild injury, slip and fall, and die from the brain injury.

The next person who watches his step, is not apt to develop that.

Q Doctor, I have one final question. Have you had actual practical experience long enough to qualify to take an examination for the Board of Neurological Surgeons?

A Yes. I have my letter from Dr. Leonard from the Board of Neurological Surgeons stating I have all the qualifications, experience and background to take the examination any time I want to.

Q You have that record?

A It is in my file. I have had that statement for two years, that my training fulfilled all the requirements of the Board for well over two years.

Q You mean your practical training, or school training?

A The Board of Neurological Surgeons requires three years private practice before one attempts to take the examination You may be a surgeon for twenty years, you would still have to be in private practice for three years. Since I went into practice in 1950, in 1952 I have the socalled practice requirement.

Q In other words, you have had the practice requirements now for about a year?

A No, since September of 1952.

Q Less than a year; about six months?

A Yes.

Q I take it then you haven't yet taken the examination?

A No. There are many examinations I have taken. There

are many associations who give examinations before you can qualify for membership. It may be desirable to take a few of those. I have a University degree in neuro-surgery, which qualifies me. There is always brought up the question of Boards, and I wrote Dr. Fenlow asking him to write me a letter to the effect I am qualified, so I will take the Board this year.

Q I know you will. I was just bringing out if you have actual experience in your profession.

A Yes, as far as private practice. I could spend a lifetime and never have the private practice. The American Board of Neurology Surgeons want you to have private practice. If I was not interested in private practice, I still could be a Professor of neurology, but I don't know that it has anything to do with knowing anything about brain surgery.

MR. WRIGHT:

That is all.

REDIRECT EXAMINATION:

BY MR. KIERR:

Q Does that mean with full time service in the U. S. Marine Hospital you would not be eligible to take that Board examination, if you did not have private practice?

A If I were not in private practice, I doubt it very much. Of course, the American Board of Neurological Surgeons consider every case individually. You can spend your time at the Marine Hospital and not take the Board examination.

Q How many brain operations have you performed, say in

the last year?

A My guess is no less than a hundred. I guess the average neurosurgeon does fifty a year or a hundred a year, unless you are in the big setup where someone else conducts the operation and you take the tumor out. All the operations I do myself.

Q Doctor, I believe your report mentions that this man had a history of osteo myelitis of a limb?

A Yes, since 1935 through August, 1952, there have been intermittent attacks of osteomyelitis, left tibia.

Q - You took that into consideration in your prognosis?

A Yes. The condition there could have absessed and gone through the tissues to the brain to cause this, but I don't consider that as a diagnosis.

Q The relaxing of the side of the face you saw demonstrated, you describe it as mild?

OBJECTION: MR. WRIGHT:

I object to the form of the question.

THE COURT:

Rephrase your question.

MR. KIERR:

I withdraw the question.

Q Mr. Wright referred to what he called a facial disfigurement on Mr. Boudoin. Did you find a disfigurement, and if so, is that what you mean by asymmetry?

A I found a weakness of the left side of the face, flattening of the muscles due to weak muscles.

THE COURT:

I think we have gone over this and we all understand what the doctor was talking about.

MR. KIERR:

Counsel emphasized the fact the patient did not complain of that, and I want to get in the record whether or not it is the sort of thing a layman would complain of as a symptom to the doctor.

THE COURT:

I think the Doctor went into the details of that on cross examination. He said it would not be.

BY MR. KIERR:

Q If the marine Hospital, upon examination of this patient found the Babinski test to be normal, would that be inconsistent with the pattern of the case, and affect your diagnosis in any way?

A Well, the neurologist is the person who has to elicit the Babinski sign, and is competent to evaluate it. If the Babinski was absent, I would expect that to be tested within a period of time and determine when it did develop. That would be important in helping me to know when it developed. If it were not very soon after the injury, for example, then it was not a congenital thing,he was not born with it. If it developed three months later, then it means it probably developed from his injury.

Q If the Marine Hospital found what they considered a slight hearing defect in the left ear for high tones, would

that have a neurological significance in this matter?

A (Witness referring to record). It is possible the Marine Hospital tested him with a high frequency audiometer , and upon testing they found a deafness in high tone. I suffer from the same thing. I don't think it has any significance. So many people have high tone deafness. Clinically, there is no indication of deafness, so I don't see how I can say it is associated with this, except might indicate injury to the eighth nerve, which is right there on the right side, on the back of the ear near the mastoid. (Indicating). We know patients having injury to the back of the head will have deafness. I didn't find any. It is possible for deafness to be related to this injury, but I disregarded it.

Q Are there any extra brain cells in the brain?

A What do you mean?

Q I was interested in whether or not there was brain damage, the brain having the capacity of regeneration?

A As far as we know, there is no regeneration of the brain to any extent. You have dead cells which do not regenerate. The brain only has a number of cells, and if you kill some, that is it. They don't regenerate.

MR. KIERR:

That is all.

RECROSS EXAMINATION:

BY MR. WRIGHT:

Q You mention the possibility of brain abcess developing

from osteomyelitis. I thought you mentioned it?

A Yes. The reason is, I do not consider that as a diagnosis in this case, I don't consider it being present, or any possibility of it being present.

Q Do you know that since the claimant in this case, Mr. Boudoin, was discharged from the Marine Hospital in February or March of 1950, that he had been confined in the Charity Hospital as an inpatient for his osteomyelitis, since he was discharged from the Marine Hospital in February or March, 1950, that he has received as an inpatient at the Charity Hospital?

A No, I don't know it. I don't know if he had any draining osteomyelitis or not. I don't think that was the cause.

Q Do you know the doctor said the man was suffering from draining sinus as late as August, 1952, and during that period?

A Yes. I think I stated in the record through August, 1952. That is in my report.

MR. KIERR:

I may say that is in the Doctor's report, a copy of that Mr. Wright has.

BY MR. WRIGHT:

Q Did you review the record from the Charity Hospital --

A I just stated I didn't know he had been going to the Charity Hospital.

Q Would all types of nystagmus cause dizziness?

A May or may not.

Q Are there any particular kinds associated with dizziness and headaches --

A I just mentioned vertigo, the spinning around. Nystagmus produces a feeling of spinning around.

Q Nystagmus generally, or any particular type of nystagmus?

A True nystagmus.

Q Generally?

A What do you mean by generally?

Q There are different types of nystagmus?

A Yes.

Q And you stated some can be congenital in nature?

A Yes. The patients who have congenital nystagmus do not have dizziness. They are born with it, and nature has adjusted them to it over a period of many years.

Q What about headaches?

A I don't think there is any relation between congenital nystagmus and headaches. Most congenital nystagmus do not produce symptoms, because the patient is adjusted.

Q If the Babinski were to result from trauma, in what period of time would it become apparent to the patient after the trauma episode?

A It may appear immediately, or as late as up to two or three years later. I would say usually it happens within a few months.

Q Would you even go further than that and say usually it would occur later, because the brain cells die?

A Shrinkage of the brain cells. It could produce signs later on, and that is why we have neurological signs develop a long time after injury.

Q If we had a patient who did not have this Babinski sign immediately following the trauma incident, but had it develop months later, would that patient's dizziness and headaches, which would be associated with his trauma injury, be increased during the period of time that his brain is developing to the point where it is going to show up in a reflex disability?

A The disease doesn't have mathematical relationship. You may have proved pathology, and the patient die from cancer. Some of them with brain injury and up in an institution because of insanity, and the patients don't know anything about it. I have to answer that, either way. Some patients get better and some worse.

Q Lumbar puncture. I notice from this Marine Hospital record a lumbar puncure was taken on February 16, 1950, and at that time it was found that the fluid was clear. If the man's brain was going to have this type of Babinski show up years later, or months later, would his spinal fluid be normal at that period of time following this trauma?

A I think I mentioned the spinal fluid finding after severe head injury was perfectly normal spinal fluid. It would reflect other things, syphilis and other things.

Q The appearance of these objective signs that you have mentioned then, would not necessarily be accompanied by any

change in the patient?

A Please explain that. What kind of change?

Q Well, change in the intensity of his headaches, or the times of their recurrence.

A It may or may not. I have patients with brain tumors --

Q I am not talking about brain tumors.

A You are talking about brain injury. Some have brain tumors, some have brain injury. One patient will come to us suffering from a brain injury and become incapacitated. We have to depend on the neurological signs to make up our minds.

MR. WRIGHT: That is all. Your Honor.

BY MR. KIERR:

Q The sclerosis you mentioned is not the same as the systagmus Mr. Wright mentioned?

A No. One is a disease of the brain, which is of an unknown cause. The other is multiple sclerosis, which this patient doesn't have.We haven't found any evidence of multiple scerosis.

MR. KIERR: That is all.

THE COURT:

I don't think the record develops what the Babinski sign is

THE WITNESS:

That was developed by Dr. Babinski in 1903. The normal individual,when the bottom of his foot is straight,the toes will bend and the big toe bends.That was the normal action found in Mr. Boudoin's right foot. On the left foot,however, the big toe tends to to up and away from the other toes,which

is abnormal, due to the disease of the nerves, and we depend a great deal on that sign.

BY MR. KIERR:

Q The test includes an injury such as this?

A Yes.

Q Doctor, the report regarding which you testified, dated March 9, 1953, and to which opposing counsel has made reference, is the one I show you bearing your signature?

A Oh, yes.

OFFER: MR. KIERR:

In connection with the Doctor's testimony. I would like to offer,produce and file in evidence the said report,dated March 9, 1953, a copy of which was furnished opposing Counsel on yesterday, designated as Plaintiff-1.

MR. WRIGHT: We have no objection to the report.

...oOo...

MRS. EDDIE V. COOKSEY: (Called but not sworn)

BY MR. WRIGHT:

Q Is this the record on Elie J. Boudoin?

A It is a complete record from 1936 through August 20, 1952, of all the admissions we have on him for that period.

Q Does it show whether or not he has received any treatment at Charity Hospital since November, 1949?

A Yes. He has received treatment for inpatient from August 20, 1952 through September 11, 1952, with visits to the outpatient clinic. His last visit was on October 8,1952. He was to return in four weeks,but we have no record of his having returned.

Q What date in August was he an inpatient?

A From August 20, 1952 and he was discharged on September 11, 1952.

Q Did he receive any other treatment at Charity Hospital since November, 1949, other than on that occasion?

A We have no record of him having been in the Charity Hospital from September, 1941 until August 20, 1952. He could have been in the emergency department. In that case we have to have dates.

Q During August, 1949 and the months following when he was to return and didn't return, what was he suffering from?

A August, 1949?

Q August, 1952.

A Chronic osteo myelities of the left tibia.

Q What does the record reflect with reference to his osteo myelitis?

A Very chronic. Twenty-seven year old white male, chronic osteo myelitis of the right tibia with ulcer on anterior aspect of leg, lower third.

Q During the period of time he was in the hospital, does the record reflect whether or not he complained of any other type of disability or ailments, aside from the chronic osteo myelitis?

A He was in here for other things other than osteo myelitis, in May, 1940.

Q I was interested in confining my question to the period since November, 1949 to date. Was he complaining of anything other than osteo myelitis during that period of time?

A Not at Charity Hospital. We have no record of it.

Q Is there anything in the doctor's notes, or the nurse's notes or comments, covering the period of time when he was actually an inpatient, to indicate that he had any other complaints aside from the complaint of osteo myelitis?

A No. There is none.

OFFER: MR. WRIGHT:

In connection with the testimony of the witness, we would like to offer, introduce and file in evidence, the portion of the Charity Hospital record dealing with the treatment received by Elie Boudoin, for the period referred to by the witness, subsequent to November, 1949. In other words, his inpatient treatment in August of 1952 and the months following August, 1952, and if agreeable, we will substitute photostat copies of the record which we have obtained, in lieu of the original, which I believe should be returned to the Charity Hospital.

THE COURT:

Do you object to it?

MR. KIERR:

No, sir, nor to the original.

MR. WRIGHT:

We will leave the original here temporarily.

THE WITNESS:

If you give me a receive that it will be returned to me.

THE COURT:

Give the lady from the Charity Hospital a receipt for the record.

MR. WRIGHT:

I am wondering if Mr. Kierr will object to our failure to have the witness from the Charity Hospital sworn.

MR. KIERR:

I didn't object to the lady answering the questions, because I didn't imagine she was going to testify as a witness. Some of the questions propounded to her were of a technical nature perhaps, that ought to be answered by a doctor. However, the record speaks for itself, and since she has left the Court, I suggest that she not be interrogated further.

THE COURT:

The lady has already been here. The questions asked are of no value to the Court, because they do not touch upon the particular accident, but they are in the record. I think the record shows he complained of osteo myelitis. The record speaks for itself.

o-o-o-o-o

CLELIE MALL: Witness, being duly sworn on behalf of Defendant, was examined and testified as follows:

MR. WRIGHT:

Suppose we do the same thing with the record from the Touro. Will it be necessary to identify the record?

MR. KIERR:

We will cheerfully admit it, if this lady says that is a record from the Touro.

THE WITNESS:

Yes, it is.

THE COURT:

Give the lady a receipt for the record.

o-o-o-o-o-o-o

JOHN F. BUCKLEY: Witness, being duly sworn on behalf of defendant, was examined and testified as follows:

DIRECT EXAMINATION:

BY MR. WRIGHT:

Q Please state your name?

A John F. Buckley.

Q Are you appearing here in response to a subpoena duces tecum that you received?

A Yes, sir.

Q Do you have the return on the subpoena that you can make at this time?

A Yes, sir.

Q Have you checked your records on Elie J. Boudoin as a result of receiving that subpoena?

A Yes, sir.

THE COURT:

Have the witness identify himself.

BY MR. WRIGHT:

Q What department of the city are you in charge of Mr. Buckley?

A Sergeant, New Orleans Police Department, in charge of the records division.

Q And are you actually custodian of the records?

A Yes, sir, I am.

Q And what records are included under your custody?

A Well, all the accident reports, murder reports, homicide, anything pertaining to police work, arrest card, property books, evidence books, anything that comes under the heading of the police department, I have in charge.

Q What about convictions which are the results of arrests?

A Yes, keep them too. I have custody of that.

Q Do you have any records on Elie J. Boudoin under your custody?

A Under that name, yes, sir, I have.

Q Can you state what those records show, if anything?

A Yes. I have fourteen arrest cards under the name of Elie J. Boudoin, B o u d o i n, seven of which are under the charge of simple drunk, in other words, drunkenness; four arrest cards under the name of Elie Boudoin, charged with loitering.

Q How do you spell the name of this party reflected on these various cards that you have identified?

A Elie is the first name and B o u d o i n, is the last name.

Q Do these chards give his home address, age, or any other identification?

A Yes, sir, gives the date of the arrest, his age and the charge.

Q What is the first date that you have that he was arrested

for drunkenness?

A Let's see now. I have these things mixed up here. (Witness referring to cards). The first date if June 7,1948.

Q Would you read the card for the identification with reference to the man?

MR. KIERR:

May I inquire, Your Honor, whether this pertains to a conviction. I didn't understand Counsel's question to pertain to a conviction.

BY THE COURT:

Q How many convictions do you have?

A None, Judge. The charge of drunkenness, I want to explain that first. There is no city ordinance covering drunkenness. The police take them in custody merely to keep them out of trouble, and keep them until they sober up, and it is left to the man in charge of that district. At least he has to stay six hours, and at the end of that time if he is not sober enough he has to stay additional time.

OBJECTION: MR. KIERR:

May I interpose an objection to any of the questions seeking to elicit evidence about matters which do not involve convictions.

THE COURT:

I overrule the objection. The Court will take judicial notice of the fact, number one, people do not usually get arrested for dunkenness unless they are drunk, and number

two, it is the practice of the New Orleans police any drunk picked up is held until he is sober. Let's proceed.

BY MR. WRIGHT:

Q Would you then give us the identification on that first arrest that you have on Elie J. Boudoin? In other words, how old was the man, what is his home address, and any other identification marks that may appear?

A Unfortunately, on this first arrest card, the only thing that appears is his name, his race and identity number given to that particular arrest, and the date, and the charge of drunk.Due to laxity of one of the clerks, the full data was not put on the arrest card. That happened in 1948 before I was in charge of this office.

Q On the second card, in so far as the date is concerned, what was the second arrest?

A Drunkenness. He gave his age as twenty-three and his address as 1418-1/2 Canal Street.

Q What was the date of the arrest?

A November 3, 1948.

Q And how was the name spelled?

A His first name, Elie, E l i e and his second name, B o u d o i n.

Q And what was the date of the arrest?

A November 3, 1948.

Q The third arrest was under what date?

A If you will pardon me, I omitted something there. Like I said, every arrest is assigned an identification number.

This first arrest the number is "F". We start off by months. January is "A", February "B", and we go clean through from "A" to "L", and the first arrest for that particular month is given 1A-48. It may not be an arrest. It may be an accident. We always give it a number.

Q I wasn't particularly interested in the number, Mr. Buckley.

THE COURT:

I think we can save time, if you introduce these cards in evidence. All this man does is keep them.

OFFER: MR. WRIGHT:

In connection with the testimony of the witness, we offer, produce and file in evidence the various cards, kept under his supervision, and ask they be marked for identification, Defendant Exhibit-1 through 14, identifying them with the added notation of the name of the witness.

OBJECTION: MR. KIERR:

May I interpose an objection to the introduction of these documents in evidence, for the reason no foundation has been laid for them; it is not the proper time. Their relevancy has not been established, and they are objectionable. I have no objection to their being left with the Court, and considered certified as the official records which they purport to be.

THE COURT:

I overrule the objection. The records speak for themselves, and you will have opportunity to examine any witness

you wish about them. You can examine this witness, if you like. Let's proceed.

MR. WRIGHT:

If he wants the cards back, I will have them photostated.

THE WITNESS:

When will I get them back?

MR. WRIGHT:

Tomorrow.

MR. KIERR:

I have no objection, Your Honor, We reserve our rights.

o-o-o-o-o-o-o-o-o

MR. KIERR:

We had issued a subpoena to the defendant to produce certain documents. I don't observe any representative of that corporation in Court, although I wanted him to identify the documents. The only other person in Court is from the Shipping Commissioner's office, whom I would like to interrogate regarding the official log book.

THE COURT:

All right.

BERNARD W. FOSTER: Witness, being duly sworn on behalf of plaintiff, was examined and testified as follows:

DIRECT EXAMINATION:

BY MR. KIERR:

Q Please state your name?

A Bernard W. Foster, Jr.

MR. WRIGHT:

We are willing to admit this is the official log book.

MR. KIERR:

Which I infer is admissible in evidence. I want also to stipulate that the official log book, at page-22 has attachments consisting of eight pages which were incorporated by reference in the actual bound book.

OBJECTION: MR.WRIGHT:

I am going to object to these statements being introduced, on the ground that these are statements from some seven or eight witnesses on the ship, none of whom were, six or seven of whom were not produced by either party, and consequently not subject to cross examination by us. One or two of them, I think two of them, the chief officer and master, made statements that have been introduced in connection with their depositions, and we do not object to those statements, but statements made by witnesses not produced by either side, we do object to.

THE COURT:

These statements were returned with the official log of the Coast Guard?

MR. KIERR:

Yes, Your Honor, and further incorporated by entries in the log. The captain made the statement: "Statements to be attached to this log", over his signature, in his handwriting, "G. P. Townsend, Master."

MR. WRIGHT:

If the statements are to be considered part of the log entry, because of the fact someone attached them to the log, we would oppose the introduction of the log and the introduction of the statements attached to the log, on the ground these witnesses have not been produced and subjected to cross examination. The information in these statements has not been proven in the proper fashion, and we have not subjected those witnesses to cross examination.

THE COURT:

The Court's ruling is the log book is admissible, but not the statements. The statements are excluded.

MR. WRIGHT:

The log book, I take it, is offered merely to identify it as the log book, and the entries made following the accident, in other words, a summation of the accident that took place and how the accident happened. I take it, the purpose of introducing the log is to prove the facts recited in the log.

THE COURT:

The log is admitted for whatever value it has, including whatever value it may have reciting the entries in the log. With reference to the statements, they are excluded.

MR. WRIGHT:

What about the statements contained in the log based upon hearsay information of the captain, which he received from other witnesses?

THE COURT:

As far as the captain is concerned, that would be a declaration against interest.

MR. WRIGHT:

He personally heard the information from other people.

THE COURT:

The Court has ruled the log book is admissible. Let's proceed.

MR. KIERR:

So I may understand the ruling, I take it from Counsel's observation that the statement given by the master and by the Chief officer, which he says is already admitted in evidence, is not objected to by him.

MR. WRIGHT:

I didn't say they were already introduced in evidence. The statements of the captain and chief officer were used to refresh their memories at the time the depositions were taken. I am not going to interpose an objection to them. I think there is some question as to how many statements were involved, and what statements both of them had referred to, but those that are attached, not to the log, but to the depositions, that they testified with reference to, to refresh their recollection, will be admissible.

MR. KIERR:

In other words, in so far as these statements coincide with the others, they will not be excluded.

THE COURT:

As I understand Mr. Wright's statement, the two statements introduced in evidence together with the depositions.

MR. WRIGHT:

There were statements Mr. Kierr had photostat copies of, some of them, maybe all of them. He introduced those statements and had them attached to the depositions we took. Those statements I object to. I want to object to any statements other than those which were used by the captain and chief mate to refresh their recollection, including those statements that might be contained on the same page, which were attached to the depositions.

THE COURT:

Let's talk about these statements. As far as these statements are concerned, they are excluded. I may admit the captain's statement on the ground he was in charge.

MR.WRIGHT:

I think the captain's statement was used to refresh his recollection.

THE COURT:

I will have to look that up. Let's proceed.

MR. KIERR:

One of the documents is not called a statement. It is called: "Copies of entries in official log book to be given to Manuel Gonzales." It is signed by the chief officer and Captain Townsend, and I think that ought not be excluded. I would like to note in the record a bill of

exception to the Court's refusal to admit the documents, and suggest that Your Honor consider at a later time the admissibility of them for such purpose as they may serve.

THE COURT:

All right. Proceed.

BY MR. KIERR:

Q You are the representative of the U. S. Coast Guard Shipping Commissioner in New Orleans?

A Yes, sir.

Q In what capacity?

A Deputy U. S.Shipping Commissioner.

Q You are producing, in answer to a subpoena, what purports to be an official log book of the S/S MASON LYKES, for a voyage commencing in September, 1949 and terminating in December of that year?

A December 19, 1949.

Q Is a vessel such as this one, required by law to make an official log book available to you for your permanent files?

A Yes, sir.

Q Is it not correct that masters and officers of vessels are required to note therein all unusual happenings aboard the vessel?

A Yes.

Q Would that include injuries sustained by members of the

Q How about entries concerning alleged assaults to non-members of the crew.

A Yes, aboard ship and ashore.

Q Did you ascertain whether this official log book contained such information regarding a seaman employed in the capacity of oiler, named Elie J. Boudoin?

A Yes.

Q What was the date, place and time of the entries concerning an assault?

A (Witness referring to document). At 8:30 AM, November 25, 1949. The entry reads: "At about 1:45 AM. on November 25, 1949."

Q That entry seems to take in pages 18, 19, 20, 21 and 22, doesn't it?

A Yes, sir.

MR. KIERR:

Your Honor, we can dispense with the reading of these pages at this time.

Q There is clipped to page-22 of this official log book some extra pages, some eight in number. Will you explain what those extra pages are?

A They are statements from the captain, chief mate and witnesses to the fight.

Q The first statement is from the captain. The second statement is from Gonzales, but he refused to sign it?

THE COURT :

The information is admissible so the Court of Appeals can determine whether or not I was right in my ruling.

MR. WRIGHT:

He is now reading from the statements.

THE COURT:

He is not reading from the statements.

MR. WRIGHT:

He read one, read the fact someone refused to sign the statement. He read the name of one.

THE COURT:

I think the names ought to be included. How is the Court of Appeals going to rule on whether or not they should be admitted?

MR. WRIGHT:

Certainly no more than the names.

THE COURT:

Give the names only.

A The captain, deck mate --

BY MR. KIERR:

Q What is at the top of the third sheet?

A "Copy of entries in Official Log Book --"

OBJECTION: MR. WRIGHT:

I object to everything that has been said with reference to the contents of these statements, other than the names

THE COURT:

It is understood the contents of the statements are excluded.

BY MR. KIERR:

Q Without giving the contents of the documents, will you give us the names, starting with the next witness?

A Statement of Elie J. Boudoin.

Q And the next?

A Statement of Harry F. Brock.

Q And at the bottom of that page, is there another statement?

A Statement of Clarke Staggers, chief mate.

Q And the next?

A Robert G. Williamson, third assistant engineer.

Q And the next?

A Statement of Andrew M. Brown, water tender. Statement of Ernest Coutee, water tender.

Q Do all of those statements designate that it is upon the same subject which you originally mentioned?

A Yes, sir.

Q Can you tell me whether or not those statements bear signatures?

A Yes, they do.

THE COURT:

Let's proceed. The statements speak for themselves.

list and the bound log, the persons named and designated by you were in fact included in the list of the crew?

A These are the shipping articles at the time they sign on, which coincides with the same crew members.

Q And you checked that crew list and determined that those people --

THE COURT:

What do you want to do, go through the crew list and identify each one?

MR. KIERR:

As being members of the crew and in the capacity I mentioned, unless Counsel --

THE COURT:

You want to show that they were members of the crew of this vessel?

MR. KIERR:

Yes, sir, and officers.

MR. WRIGHT:

We will admit they were members of the crew of that vessel.

BY MR. KIERR:

Q Is it unusual that detailed documents of this sort attached to the log book are important in detail matters -

OBJECTION: MR. WRIGHT:

I object unless the foundation is laid for the question.

THE COURT:

He is laying the foundation to have the Court of Appeals

his question.

BY MR. KIERR:

Q Have you any other log books, Sir, with extraneous documents like that added to the log book?

A Yes, common occurrence.

Q Why is that?

A Required by law.

Q Do or do not these additional extraneous documents comprise part of the official log book?

A Yes, sir.

Q Do you know who placed the documents in the log book?

A The captain is the one supposed to, and witnessed by the mate. If an accident occurs on deck, the engineer on watch in the engine room will do it.

Q Can you say whether or not such documents are usually included in the official log in the course of the ship's business?

OBJECTION: MR. WRIGHT:

I object.

THE COURT:

I sustain the objection.

MR. KIERR:

I tender the witness.

CROSS EXAMINATION:

BY MR. WRIGHT:

Q What law requires documents to be added to the log book?

A United States Courts. It is right in the log book there. [illegible] accident occurs on the ship.

statements have to be attached to the log?

A Yes, sir.

Q Does that law refer to statements of eye witnesses?

A Yes, sir.

Q Does that law include hearsay information from people who did not see the injury?

A Yes, sir.

Q Or would it be those people who actually saw the offense that took place?

A Well, try to get statements from all we possibly can, and put the entry in the log book in a case of this kind.

Q You mean all of the witnesses?

A Yes. Some witnesses refuse to give statements.

MR. WRIGHT:

That is all.

REDIRECT EXAMINATION:

BY MR. KIERR:

Q The entry in the book to which you referred, is contained on the first page thereof, wherein they refer to "Act of Congress relating to log books", and recites thereon the section of the revised statutes of the United States?

A Yes, sir.

Q 4290 states: "Every vessel making voyages from a port in the United States to any foreign port shall have an official log book; and every master of such vessel shall make, or cause to be made therein, entries of the following matters, that is to say: First. Every legal conviction of

any member of his crew, and the punishment inflicted. Second. Every offense committed by any member of his crew for which it is intended to prosecute or to enforce a forfeiture, together with such statement concerning the reading over such entry, and concerning the reply, if any, made to the charge, as is required by the provisions of Section 4597. Third. Every offense for which punishment is inflicted on board, and the punishment inflicted. Fifth. Every case of illness or injury happening to any member of the crew, with the nature thereof, and the medical treatment." Those are among a number of other paragraphs. What I have just read, is that not contained on page one?

A Yes.

Q Is that what you referred to in your cross examination?

A Yes.

RECROSS EXAMINATION:

BY MR. WRIGHT:

Q In this entry that refers to a statement of conduct, qualifications, and so forth, that means a written out entry in the log book itself, doesn't it?

A No. You see here conduct of the man, number four.

Q When the log book refers to the word "Statement", the log must contain a statement. It even talks about certain things it must contain?

A Yes.

Q That language refers to writing in the log and not necessarily a statement attached to the log?

A In this case, probably we should write it all out, but

there wouldn't be enough room in the log book, so he typed it and attached it to the sheet.

Q Suppose he had written it out in the log in his own handwriting a description of what he had learned on the ship, would that be sufficient according to the law?

A Yes, either handwritten or typewritten.

Q In other words, if he had made an entry in his handwriting in the log, he would not be required under the law to supplement that with actual statements like these attached to the log?

A No, sir.

Q Does the law, or does it not, and is it the practice in the Commissioner's office, to contemplate the vessel and its officers making a full disclosure of what transpired on the vessel?

A Yes.

Q Could you tell us whether or not --

OBJECTION: MR.KIERR:

I object to the form of the last question, and ask that the question and answer be stricken from the record.

THE COURT:

I don't think the question has any probative value. I overrule the objection.

BY MR. KIERR:

Q. Will you state whether or not these additional typewritten pages are pertinent in so far as giving the full facts of this incident are concerned?

OBJECTION: MR. WRIGHT:

I object for the same reason, also because the answer would be out of the province of the witness.

THE COURT:

The witness knows what is going on. I think we have made about as good a record on this as we can make. Let's proceed.

MR. KIERR:

The point I want to bring out is the entry on page-14 of the log book, which states: "E. J. Boudoin, oiler, claimed to have slipped on deck of machine shop and hurt back while on watch at 1500 of the sixteenth of October. Apparent bruise on back. On this date examined by Dr. Leary aboard who prescribed liminent rub." There is another entry. Would you read that on page-15?

A "E. J. Boudoin, oiler, this day sent to port doctor who had x-rays taken. Man found o.k. and returned to duty. Two days off duty between doctor's visits." That was signed by G. P. Townsend, Master, and the chief mate.

Q Two days off duty?

A Two days off duty between doctor's visits.

Q And that entry is on October 18, 1949?

A Yes, sir.

MR. KIERR:

That is all.

MR. WRIGHT:

We have no objections.

OFFER: MR. KIERR:

In connection with the witness's testimony, we offer, produce and file in evidence said log book designated as Plaintiff-2, and offer, introduce and file in evidence the statements which are in typewritten form and attached thereto.

OBJECTION: MR. WRIGHT:

We object to the introduction of all of the statements, and the log entries, in so far as they may contain hearsay information, and information received from witnesses who were not produced here, either by depositions or during the trial.

THE COURT:

The ruling of the Court is the same. The log book is admissible in evidence. The entries in the log book are admissible in evidence. The statements which are attached are excluded.

MR. KIERR:

In connection with the Court's ruling, may we stipulate the dates contained on the statements, for the reason one of the bases upon which they should be admitted, is the fact they constitute res gestae, since taken aboard the vessel.

THE COURT:

It seems to me you have stipulated the statements may

remain in the record, and they speak for themselves, and they show their exact dates.

MR. KIERR:

I would like to ask for a return on my subpoena duces tecum.

MR. WRIGHT:

The subpoena was served late yesterday afternoon, and the officer of the company called me up and told me they had it, but I didn't receive it this morning. They sent all of the log books and said the balance of the information was in my file. I haven't had an opportunity to go through my file, except to give Mr. Kierr the document he called for, which was the medical report. I told the officer who received the subpoena it was not necessary under the circumstances to come.

THE COURT:

You may reach some agreement in the meantime. We will recess until two-fifteen.

o-o-o-o-o

2:15 PM. AFTER RECESS:

MR. KIERR:

Your Honor, Mr. Wright and I have discussed the production of documents this morning, and he has given me the logs and some papers which are not too far reaching. He says the other documents may be in Mr. Jimison's file. I have no objection to waiting until Mr. Jimison comes down.

MR. WRIGHT:

I tender the following documents. The log book called for. We have no medical log. If there is a medical log aboard the ship I have never seen it.

We will produce for Mr. Kierr the deck log book of the voyage in question and the engineer's log book. We have produced the injury report.

We have agreed, I believe, that we only have the statements which are attached to the official log book that we have already talked about, and no other statements.

Now the only thing I have open, is the question of letters or communications. The Claims Department advises me that they have no communications other than the things I have stated. However, I told Mr. Kierr perhaps letters were sent to the Operating Department, which was under Mr. Jimison, and I have asked a representative of the Claims Department to check it together with Mr. Jimison, who we are going to have here in our part of the case. However, I am quite sure if there are any, they would be in the claims file.

MR. KIERR:

In regard to the Coast Guard log book --

THE COURT:

Official log?

MR. KIERR:

Yes, sir. I have some concern about the original document, or perhaps the fact in my earlier observation,

when I introduced it in evidence, that we would substitute photostats for that document, and I ask Your Honor whether or not the photostats are included or rejected.

THE COURT:

There was no understanding whatever in regard to substituting photostats. It was my understanding the log would remain in evidence.

MR. KIERR:

I prefer it that way. I made this comment to Your Honor before. I got the impression Your Honor said the statements would be excluded. I assume you mean to take them out of the log --

THE COURT:

No.

MR. KIERR:

I think they ought to remain there for the purpose of identifying the statements in question.

THE COURT:

When a document is offered and excluded, it remains a part of the record, but is simply marked "excluded", and is not to be used in the present case.

MR. KIERR:

That answers my question.

MR. WRIGHT:

Mr. Flattery of the Maritime Union has given us some information, and has handed over his personal file to Mr. Jimison, who will bring that file with him. The

information, if I may be permitted to state it --

THE COURT:

Don't state it.

MR. WRIGHT:

The reason why it is more or less necessary to state it, is this. Mr. Flattery requested not to be served with a subpoena, provided Mr. Kierr agreed with the record Mr. Jimison will bring as the official record, plus one other piece of information I wish to put in the record. I told Mr. Flattery I would communicate with him, if I could get together with Mr. Kierr, that I would eliminate forcing him to come down here under the subpoena. Mr. Flattery said he had a great deal to do, a number of ships to go to.

MR. KIERR:

I am certainly willing to admit if this witness were called, he would testify these are records of his organization. In other words, I am sure they are not simulated records, nor have they been tampered with. I don't want to concede the accuracy of such entries in those records. I don't want to concede their relevancy. I don't want their admissibility in evidence.

MR. WRIGHT:

We may be able to work this thing out without bringing Mr. Flattery down. Anything Mr. Kierr objects to and the Court rules out, if Mr. Flattery were here, we would agree to that, but the accuracy of the records, I think that should be admitted.

THE COURT:

I understand from Mr. Kierr's statement he will admit the authenticity of the record, but not its admissibility. Is that correct?

MR. KIERR:

That is correct, Your Honor, also the truth of the information contained therein, I will not admit.

MR. WRIGHT:

I can't go along with that, because Mr. Flattery knows the information is true.

MR. KIERR:

The record pertains to what took place in a foreign country when Mr. Flattery was not there, and I don't think he was agent at that time acting in the Port of New Orleans.

THE COURT:

The record, if admitted as evidence, would speak for itself, and the Court would attach whatever value it is entitled to. On the other hand, we won't reach that point until it is admitted in evidence. What we want to find out now is, do you admit the authenticity of this record of Mr. Flattery?

MR. KIERR:

Yes, sir.

THE COURT:

That is as far as he will go. If you want to introduce the records, you will have to lay the foundation as to why they are admissibile.

MR. WRIGHT:

Mr. Kierr will agree they are the records, and if Mr. Flattery were here he would testify that the action taken, and so forth, contained in this record is true. In other words, Mr. Flattery as an official of this Union knows certain facts in there are true.

THE COURT:

Assume for example, the Union decided to exclude the plaintiff, he would know that the plaintiff was excluded from the Union, but he wouldn't know, unless he was an eye witness, the truth or the nature of the charges.

MR. WRIGHT:

He wouldn't know the truth or the nature, however, but he would know in such a situation, the action that the Union took after a hearing, whether or not that was true.

THE COURT:

The records themselves prove that. In other words, if the Union records show John Smith was expelled from the Union for not being a good fellow on such and such a day, that is as far as you could go.

MR. WRIGHT:

I have never seen this record. I want to contact Mr. Flattery, because he was kind enough to let us know what it was all about. After I see the record, I may want to call him.

THE COURT:

All right. Let's proceed. If you need him, call him.

ELIE J. BOUDOIN: Witness, being duly sworn in his own behalf, was examined and testified as follows:

DIRECT EXAMINATION:

BY MR. KIERR:

Q Please state your name?

A Elie J. Boudoin.

Q You are the plaintiff in these proceedings?

A Yes, sir.

Q What is your age?

A Twenty-eight.

Q Have you lived in this area all of your life?

A Practically all of my life.

Q Where were you born?

A Violet, Louisiana.

Q Are you married?

A Yes, sir.

Q Have any children?

A Yes, sir.

Q How many?

A Six.

Q You live with your family in New Orleans?

A Yes, sir.

Q You allege in your complaint that you served as a seaman aboard the S/S MASON LYKES? Is that correct?

A Yes, sir.

Q When did you join that vessel, approximately?

A Approximately September 5, 1949.

Q And what was your job?

A Oiler.

Q You joined in New Orleans?

A Yes, sir.

Q You made a foreign trip?

A Yes, sir.

Q When did it end, and where?

A It ended approximately the nineteenth of December, 1949 in New Orleans.

Q During that voyage did anything of an unusual nature occur with regard to you?

A Yes, sir.

Q You have heard the entries read from the log book by the representative from the Shipping Commissioner's officer, have you not?

A Yes, sir.

Q The first incident I believe he referred to was a slipping in the engine room?

OBJECTION: MR. WRIGHT:

I object to leading the witness.

THE COURT:

I overrule the objection. Is that relevant?

MR. KIERR:

No, sir. I just want to exclude it.

Q You are not making any claim with regard to any injury sustained in the engine room, are you?

A No, sir.

Q Has that accident anything to do with the complaint you now have?

A None whatsoever.

Q Did anything else of an unusual nature take place?

A Yes, sir.

Q What was that?

A Well, that was approximately the night of November --

Q Was it the early part or the latter part of November?

A Early part of the morning.

Q What part of the month, the beginning or the end of the month?

A The end of the month.

Q Where was the ship at that time?

A Walvis Bay.

Q Was that during 1949 when you were aboard the MASON LYKES?

A Yes, sir.

Q What happened to you, if anything?

A Well, I went to bed around 5:30 that afternoon and I slept through until about --

THE COURT:

Keep your voice high so we can all hear you.

A I went to bed that morning -- that afternoon about five-thirty and slept until about midnight or a little later. I woke up and I was hungry. I went to the mess hall and got a sandwich to eat and got a cup of coffee. When I got in the mess hall I heard a bunch of fellows having a --

BY MR. KIERR:

Q You mean in the mess hall?

A No, sir, right next to the mess hall.

Q You are referring to the MASON LYKES?

A Yes, sir.

Q Were you on watch at that time?

A No, sir.

Q What did you do after you finished eating?

A After I finished eating I started back to my room and this fellow Jake, he was in there --

Q What is his full name? Do you know?

A No, I don't know, Mr. Kierr. It was in his room they were having the party, and he asked me: "Do you want a drink?" So I looked around and I seen this fellow Gonzales in there, and I said: "No, I rather not have a drink, I rather go to bed and sleep", because I didn't like this fellow Gonzales, because he was one of those big bullies--

OBJECTION: MR. WRIGHT:

I object, not responsive.

THE COURT:

Take the witness back.

BY MR. KIERR:

Q I believe you said while you were in the mess hall eating you heard a party going on, or knew that a party was going on. Will you explain how you knew that?

A They were in the forecastle drinking, and the doors hanging open on the hooks, and you couldn't miss from hearing it. They were noisy.

Q Who were they, and in what respect were they noisy?

A Cutting up and cursing, you know, making like a bunch

of fellows getting together and joking about different things.

Q Was it or was it not apparent that they were drinking?

A Yes, sir, they were drinking. They were also drunk.

Q How do you know that?

A Gonzales was drunk; Jake was drunk. Gonzales was about the drunkest one in there.

Q Did you observe whether or not any bottles were in the place?

A Yes.

Q Do you know what was in the bottles, or appeared to be?

A I don't know what was in the bottles. I know they had bottles, and they drank out of them.

Q Did they or not look like liquor bottles?

A They were liquor bottles.

Q You have mentioned Jake and you have mentioned Gonzales. Were there any other persons there?

A Yes, Sir.

Q Can you name them?

A The boatswain was there, laying down sleep. He was passed out drunk, sleeping, and had one of the firemen in there.

Q You know his name?

A I think his name is Coutee, I think.

Q Can you tell us whether or not other persons aboard the vessel besides yourself, knew or should have know that that party was going on?

OBJECTION: MR. WRIGHT:

I object to the form of the question.

THE COURT:

I think you have established the place where the party was and placed the people who heard the party.

BY MR. KIERR:

Q Do you know whether or not there was an officer on watch that night and morning?

A It is required by law to have an officer on watch at all times, in port or at sea, and the officer on watch in port is supposed to make his rounds once an hour, check the cargo hatches and everything.

OBJECTION: MR. WRIGHT:

I object to the answer and ask that it be stricken as not responsive to the question.

THE COURT:

I overrule the objection. Ask him the question again, if you want to.

BY MR. KIERR:

Q I would like you to tell us whether or not there was an officer in charge aboard the vessel at that time, and what, if any, the customary practice was aboard the vessel as to his duties?

A Well, the officer in charge is just like a policeman on a beat here in town. He is supposed to watch if anybody steals on the ship on his watch, that nothing goes off the vessel, just like a policeman on his beat here in

town. That is the way it is supposed to be on the ship.

Q Does he or does he not stay awake during the hours he is on watch?

A He is supposed to.

Q Do you know whether or not the officers customarily make rounds?

A Well, all officers I know customarily make rounds. He is supposed to make rounds.

Q What do you mean when you use the word "rounds"?

A Well, he checks everything on there, sees that nothing goes on on board.

Q Can you tell us whether that would or would not include his knowing about a drinking party in the crew's quarters?

A I would say it would, because he would have to go through the passageway, and this stairway leading to the officers' deck comes right down in front of the forecastle where the drunken party was.

Q Can you tell us whether or not the voices and noise carried through the vessel?

A I wouldn't say carried through the vessel, because we have a pretty big place there, and had the cargo winches going on the outside, and couldn't tell. If you were on the opposite side of the mess hall, you couldn't tell whether it was cargo winches or the noise in the ship, or natives ashore on the docks, or what it was.

Q I didn't mean noise passing through the ship. I had reference to passing through the passageway. I believe you

said you heard the noise when you were in the mess hall?

A Yes.

Q Would persons in the passageway be able to hear what was going on in the party?

A In the passageway on the same side they were on, yes, Sir.

Q What did you do after you left the place where the party was going on?

A Well, I walked out and went to my forecastle. I seen Gonzales coming out, and he walked in the back, and he stopped in the rest room. I didn't think nothing of it. I went in my room and put my door on the hook.

Q What do you mean when you say you put your door on the hook?

A You got a door put on a hook, and you got it partly open so it won't slam, to hold it open.

Q What was the reason for leaving it partly open?

A Because it was awfully hot.

Q What did you then do?

A Put my light out and I went to bed.

Q About what time was that, Mr. Boudoin?

A I say that was about one o'clock.

Q In the morning?

A Yes, maybe a little later.

Q When did you next awaken?

A It was about ten or fifteen minutes later. I was just going back to sleep and here comes this man in. At the

time I didn't know whether a man, or what it was, and he started pulling stuff from under my bed, and I didn't know what he was doing. I jumped up and I tried to grab him to get him out of my room, and at the same time he hit me over the head with a bottle, and by that time I was fully awake and I grabbed him and I seen what it was, seen he had the neck of a bottle in his hand, and he slapped me over the eye. I grabbed him to throw him down.

During the time I grabbed him I landed on top of him, and during the scuffle he got over and got on top of me, and bruised my back on broken glass on the deck, and then the man got away from me somehow or other, and he run out in the passageway where the fire axe was hanging right opposite my door. When he did I just closed my door and turned the latch on it, because I was afraid the man might get the fire axe and finish what he started. After I seen he didn't come back, I opened my door and ran out the back passageway, the back steps, on the officers' deck, back through the officers' door and around to the chief mate's quarters, and I called the chief mate and the chief mate looked at me and sent me down to the hospital, and he said: "I'll be right down as soon as I put my shoes on." He took one look at me and said: "I got to get the captain to come down with the doctor." We had this doctor picked up in Durban, a passenger, and the doctor worked on me about three or four minutes and got the vein tied in the back of my head. He cut the vein back

there. I lost about a quart of blood, a little more or little less. I can't say how much I lost. Anyway he tied the vein and stitched it up, and he gave me a shot of something in my back and gave me some pills to take, and after he got through with that he wiped the blood off of me. He wouldn't let me go in the washroom, which I couldn't have done by myself just then, because I was too weak. I couldn't do it for the next two or three weeks. Then he put me to bed and afterwards he came to see me every day while I was in there, and I would get those headaches until I couldn't stand them any more, and he gave me pills of some kind that he had to relieve me for a while.

Q Did you resume your duties after that?

A No, Sir. The doctor wouldn't let me and I don't think I could have went to work.

Q You stated that after you were struck on your head you became fully awakened and saw who the man was. Will you tell us who he was?

A Yes, sir.

Q Who?

A Manuel Gonzales.

Q You know what job he had aboard the ship?

A Yes.

Q What?

A Deck maintenance.

Q What sort of person physically? Was he a large or small man?

A He was a large man, weighed about, I would say, 180 or 200 pounds, twice as big as I was. I wouldn't say twice as big.

Q I show you here what purports to be a picture of the said Manuel Gonzales. Can you verify whether or not it is he?

A (Witness referring to picture). I think that is him.

Q Is that he?

A That's him.

Q How much would you estimate the man shown in that picture to weigh?

A I estimate him to weigh about the same he weighed then, about 180 to 200 pounds.

Q Can you tell us about how tall the man is?

A He is about my height or a little taller.

Q How tall are you?

A Five feet seven inches.

Q And how much do you weigh?

A I weigh about 140 pounds.

Q Would you say the arms and shoulders shown in that picture of Manuel Gonzales are husky or not?

A Yes, sir.

Q I believe you indicated in your testimony you didn't want to go into the place where he was attending a party. Was there a reason for that?

A Yes, sir.

Q What was the reason?

A The guy was a big bully in the first place, hollering

about who he beat up ashore. As a matter of fact, I seen him in Durban, I think it was --

OBJECTION: MR. WRIGHT:

I object to the testimony of the witness as not responsive to the question, and ask that it be stricken, particularly with reference to what Gonzales said.

THE COURT:

We have to meet the issue sooner or later. Is the plaintiff going to seek to prove the character of Gonzales by legend or otherwise?

MR. KIERR:

I think possibly establish by the log book, and particularly some of these statements we have discussed, some of which I trust will be in evidence, such as the master's. I do want to amplify that proof by the knowledge which the plaintiff has concerning the man.

MR. WRIGHT:

Personal knowledge, I don't object to. I object to hearsay knowledge.

THE COURT:

Under the circumstances of this case, general reputation would be admissible. I assume Counsel is going to say the plaintiff is familiar with the reputation of a belligerent individual.

MR. WRIGHT:

I object to it being brought out by the plaintiff himself.

THE COURT:

I overrule the objection. Let's proceed.

BY MR. KIERR:

Q Did you personally hear Mr. Gonzales make these statements?

A I did.

Q Are you familiar with seamen to the extent that you have sailed with many of them?

A I am.

Q Did this man Gonzales have any particular reputation aboard the vessel, that is, can you tell us how he was looked upon by those men who worked with him, including yourself?

A Well, he was looked upon --

THE COURT:

It is understood the defendant's objection is to this whole line of testimony.

MR. WRIGHT:

Yes, sir.

A He was looked upon as a big bully. Every time he would get in a card game he would say: "I want this, I want that and you can't do nothing about it", and all that stuff.

BY MR. KIERR:

Q How about particularly with regard to this man Gonzales when he is drinking?

A He was mean, a mean fellow. He just as soon pick a fight with anybody. He just as soon cut a man's throat when

THE COURT:

Mr. Kierr, let's be more specific than that. Let the plaintiff say whether or not he heard the reputation of Gonzales discussed, and then get the particular incidents on board the ship which possibly should have been known to other members of the crew.

BY MR. KIERR:

Q You understand what I mean by the man's reputation?

A You mean his conduct.

THE COURT:

What other people think about him.

A What other people think about him?

BY MR. KIERR:

Q Yes, think about him.

A Well, what other people think about him, that is pretty hard to say, Your Honor.

Q Well, do you know what the other fellows on the ship thought about him?

A The other fellows talking about him. I think they didn't think very much about him,because he always bullying that way.

Q Did he ever have any fights on the ship?

A Yes, sir. He had one with my roommate,Andy Brown,in Durban.

THE COURT: Suppose you proceed along that line.

BY MR. KIERR:

Q Will you explain how you know he had a fight with Mr. Brown in Durban?

A Mr. Brown told me himself.

Q Was that generally known aboard --

OBJECTION: MR. WRIGHT:

In view of that, I have to object to all that testimony referring to the situation involving Andy Brown.

BY THE COURT:

Q Was it generally known on board the ship that this man had a fight with Brown?

A Yes, sir.

THE COURT:

Objection overruled.

BY MR. KIERR:

Q Did Gonzales tell the crew about any other fights he had?

A Yes, sir. He always telling about how he hit them here in New Orleans before he got on the ship, and how many policemen he beat up and run off there.

Q I believe you said that about the time this man struck you, you then became fully awakened. What did you mean by that?

A I meant I was half asleep when he came in there, and by the time he hit me I really woke up then. I don't know whether the water splashing on me, or what it was, but I really woke and knew what I had to do then. I knew I either had to take the bottle away from him or die.

OBJECTION: MR. WRIGHT:

I object to the last remark as voluntary, not responsive to the question.

THE COURT:

I sustain the objection. Let that remark be stricken from the record, about what he had to do.

BY MR. KIERR:

Q You said that you tussled with this man after you were struck. Was there or was there not a reason for your engaging in a tussle with him?

A Yes, sir.

Q What was that reason?

A He stabbed me with the broken neck of that bottle and cut my eye, and I had to stop him some way.

Q Was that or was that not in self defense?

A Yes, sir. I couldn't let the man keep on stabbing me.

Q You said you may have been awakened by water splashing on you. What were you referring to when you said that?

A I was referring to the contents of the bottle.

Q Was that water?

A No. It was alcohol.

Q When you said water, you meant liquor?

A Yes, liquor.

Q Can you tell us whether or not there were any bottles with alcoholic beverages in them, in your room?

A Yes, sir.

Q Where?

A Under my bed.

Q How did they get there, and what were they?

A Well, it was several bottles of -- one was brandy, one cognac and one anisette that I bought over there cheap and was bringing it back home as souvenirs for my friends here in town, and I was going to bring them back and pay the

duty on them. I am allowed a gallon of liquor to bring back to the States.

Q You can bring back a gallon of liquor duty free?

A No. You pay duty on that.

Q Had other man brought such bottles and such contents aboard the vessel or not, to your knowledge?

A Yes, a number of them.

Q Had you invited Mr. Gonzales to take that bottle?

A No, sir.

Q Did he or did he not have permission to come into your room?

A He had no permission at all.

Q Was he or not your room mate?

A He was not.

Q Can you tell us whether or not he had a right to be there when this incident took place?

A He had no right at all to be there. My room on the ship is like my home.

Q What do you mean by that?

A No one is allowed in my room, only myself.

Q You mean without your permission?

A Without my permission.

Q Was your room mate there at the time of assault?

A No, sir.

Q What caused you to be aware of his presence in your room?

A Well, it was either when he dragged that paste board

box from under my bed, or either he touched me. I don't know which it was, and then I woke up and I seen somebody stooping under my bed pulling something out. I didn't know what he was doing. I went up there. I didn't know he was taking anything, but when I did get there and grabbed him, he hit me and at the same time he hollored: "You SOB I will kill you."

Q I believe you said you didn't drink anything at that time?

A No, sir.

Q And had only coffee in the mess hall?

A Coffee and a sandwich. That's all.

Q Is there any reason why you went to bed at five o'clock in the afternoon?

A Yes, sir.

Q What was that?

A I had been drinking the day before.

Q When you say the day before, you mean the day before the assault --

OBJECTION: MR. WRIGHT:

I object to that.

BY MR. KIERR:

Q-- or another day?

BY THE COURT:

Q When you say you had been drinking the day before, you mean drinking up to five o'clock?

A Yes, sir.

Q When you say you had been drinking the day before, you mean drinking up to five o'clock?

A Yes, sir.

BY MR. KIERR:

Q Drinking ashore?

A Yes, sir.

Q Is that the first time in your life you drank intoxicants?

A No, sir.

Q Can you tell us whether or not when you went into the mess hall for food that night you were in possession of your senses?

A Yes, sir. I slept from five o'clock that afternoon until twelve or twelve-thirty that night.

Q I would like to know whether or not you were intoxicated?

A No. I was entirely sober.

Q How about at the time the assault took place?

A I was entirely --

OBJECTION: MR. WRIGHT:

I object to the form of the question.

THE COURT:

I overrule the objection.

A I was entirely sober.

BY MR. KIERR:

Q Did you observe, what, if anything, Mr. Gonzales did while you were in the hospital receiving medical attention?

A While I was in the ship's hospital, you mean?

Q Yes.

A The next morning the captain -- you mean at the time of the injury?

Q When they were giving you first aid and tieing the vein?

A When the doctor was there?

Q Did he do anything except tie the vein?

A Put some stiches.

Q You know how many?

A I don't know, eighteen or twenty. During the time the doctor was in there stitching it up, Gonzales came in there and rolled his arm up and said: "I got to give this man some blood, I am responsible for it. I hit him over the head with a bottle. Lucky I didn't kill him". He kept on insisting, an the captain had to threaten to send him off to bed. The captain threatened to put him in irons if he didn't go to bed. The next morning --

Q Can you tell us whether or not at that time Gonzales was sober?

A He wasn't sober. He was drunk.

Q You were going to tell us the next that happened later that morning?

A The next morning the captain told Gonzales to clean up the hospital --

Q When you say the next morning --

A I mean the same day of the accident, the captain told Gonzales to clean up the hospital, clean up the floor, and take the dirty linen down and the bandages the doctor used,

and Gonzales started to go, and as soon as the captain got up to the steps leading up to his deck, Gonzales took off and Gonzales didn't come back for two days. He went uptown and he didn't come back for two days.

Q Do you know whether or not any action was taken regarding him when he did get back?

A I know the captain did put him in irons for a month, well, until he sobered up.

Q When you left the vessel did you get any medical treatment?

A When I left the vessel?

Q Yes.

A I went to the Marine Hospital before I left the vessel.

Q Were you admitted there?

A No, Sir, outpatient department.

Q Did you get any examination then?

A Yes, sir.

Q What, if anything, did the doctors tell you?

A What's that?

Q What, if anything, did the doctors tell you at the hospital?

A Well, they just kept on checking me in the outpatient department, and when they discharged me my headaches got worse, so I went over and they put me in the hospital and took a spinal tap on me --

OBJECTION: MR. WRIGHT:

I object to any testimony about what the doctors did.

THE COURT:

I don't think this witness is in position to testify what the doctors did; technical anyway.

BY MR. KIERR:

Q Did they give you any advice as to care for yourself, Mr. Boudoin?

A Yes, sir.

OBJECTION: MR. WRIGHT:

Same objection.

THE COURT:

Overruled.

BY MR. KIERR:

Q What did they tell you?

A When the doctor discharged me, he said lay off drinking, don't drink too much, and get all the rest you can, that's the only thing that would do me any good; I could take all the medicine I wanted to, it wouldn't relieve me.

Q Did you follow his advice?

A Yes, sir.

Q Did you follow his advice with regard to resting?

A Yes, sir.

Q Did the steamship company pay any maintenance to you while you were an outpatient?

A Yes, sir.

Q For about how many weeks?

A I say about a month and a half or two months, something like that.

Q When, if ever, did you return to work?

A The first job I held was in August of the next year, 1950.

Q Where did you go to work then?

A I went to work for the City Sanitation Department.

Q Why did you not go back to sea, if there was a reason?

A I had bad dreams, and I always got afraid after this happened. I couldn't sleep well at nights while I was on the ship coming back, so I decided to stay home for a while, and when I finally decided to go back to sea, I made two or three trips since then, and always suffered with my head and dizziness while on the ship, so I finally decided I would quit going to sea altogether.

Q What do you mean, suffering with your head?

A It is worse when I am on the ship, it aches worse, and I get dizzy spells more often.

Q What ships did you sail on?

A I sailed on the Fairfield; Jacob Westervelt and Southern Trader.

Q How many months all told were you on those ships, approximately?

A Approximately seven months altogehter.

Q And those are all the ships you have been on since you were injured?

A Yes, sir.

Q Did you have to sail through any hiring hall to get aboard those vessels?

A Yes, sir.

Q Which hall was that?

A I sailed through the S. I. U and the M. F. O. W.

Q Either of those hiring halls which you joined from the MASON LYKES?

A Yes, sir.

Q Which was it?

A NMU.

Q Are you a member of the Maritime Union now?

A No, sir.

Q What were your earnings on the MASON LYKES per month, approximately?

A With my overtime approximately $300.00 a month.

Q What was the base wage?

A $248.00.

Q How much did you earn at the first gainful, or profitable work, after your injury in August, 1950?

A About thirty-three or thirty-four dollars per week.

Q Could you tell us which job you worked at then?

A The Sanitation Department.

Q For the city of New Orleans?

A For the City of New Orleans, yes.

Q Until that time did you receive any money from any source other than the maintenance from the company?

A Yes, sir.

Q What funds were those?

A I got money from the Welfare, the Louisiana State

Welfare, until my first social security came through.

Q How long did you work for the Sanitation Department?

A Oh, I was there from August until December.

Q Why did you leave that employment?

A Well, I was just getting too much walking.

Q What do you mean, too much walking?

A It was too much walking, running and walking. I would get dizziness and headaches. It was too much walking and running. You had to run behind your wagon, collect the garbage and throw it in the truck.

Q What was the next job you had?

A The next job I had, I was helping a fellow collect scrap iron and stuff.

Q How much did you earn in that work?

A Well, I didn't have no fixed salary. The fellow gave me so much, depending on how much stuff he would get.

Q Can you tell us how much money you made while you were in that job, Mr. Boudoin?

A I say about a hundred dollars, I guess.

Q Did you work anywhere else after that?

MR. WRIGHT:

I didn't hear that. Did he say $100.00 a month?

THE WITNESS:

About a hundred dollars, I said; no salary.

BY MR. KIERR:

Q Where did you work after that?

A I went to the Touro and finally got on the John Fairfield

Q After that did you work ashore?

A No, sir.

Q You then got on your second ship?

A Yes, for about a month.

Q Did you do any work ashore?

A Yes.

Q Where?

A I drove a cab.

Q How much did you make there?

A Not enough to make it worth while, Mr. Kierr.

Q What do you mean by that?

A About twenty or thirty dollars a week.

Q How long did you do that?

A About two or three months.

Q Any other job after that?

A Click Delivery Service.

Q How long did you do that, and how much did you earn?

A I worked for them about a week and made about $40.00 on them.

Q And thereafter where did you go to work?

A I went to work for the Owesten Marine Company.

Q How long did you work, and how much did you make there?

A I worked for them about three weeks, and made with them about Thirty-eight or Forty dollars a week.

Q And after that did you get another job?

A Yes, sir. I went to Joyner Distributing Company.

Q How long did you work there and how much did you make?

A I went to work with them the last of July and I am still with them.

Q What type of work is that?

A Selling ice cream; truck.

Q Will you explain what your duties consist of now?

A My duties consist of driving a truck and getting out and selling ice cream to little children and their parents, anybody out there to buy it, and making change, then coming back in at night and loading out in the morning.

Q Are you able to do that work?

A I think so. That is about the only thing I found I could really do, and I am out in the fresh air.

Q What do you mean by that?

A Since I got my injury that is the only job I have been able to hold.

Q Why are you able to hold that job, whereas you couldn't the others?

A This certain type of work you are outdoors, and if you are feeling bad you can stop. You are your own boss. If you don't make any money you just don't make it. If you are feeling bad, you can stop, park and rest. You don't have to keep on going as if you got a boss expecting you to go out there and do a day's work. This fellow gives us the truck and tells us, the more you make the more I make.

Q Have you or not had occasion to take such rest as you have just described, on this job?

A Yes, sir, many times.

Q Why?

A Whenever I get a headache, I can't work properly with a headache.

Q Will you describe the best way you are able, what kind of headache you are talking about?

A My headache is right back in here, (indicating), and when it is bad I don't feel like doing anything. I can take aspirin or anything and it doesn't do me any good.

Q How bad is it?

A It is pretty bad sometimes, and other times a mild pain. It all depends on what kind of headache that I get.

Q Can you use any words to describe to me what you mean by bad headaches?

A Sometimes it is a little mild pain, and other times I get a headache that throbs in my head. Have you ever had a toothache?

Q Yes, sir.

A Not quite as bad as that, but something like a toothache.

Q How much have you averaged by working as an ice cream salesman?

A I say about $150.00 a month.

Q That is since last July?

A A little more or a little less.

Q I would assume that would depend --

A Depend on the weather. When we have rainy weeks we don't make any money. If we have a fair week, we make fair pay.

Q When you went to sea, about what percentage of the time would you sail, all the time, about twelve months of the year?

A No, sir, approximately ten months out of the year.

Q Are you making now as much as you made when you went to sea?

A No, sir.

Q Can you tell us whether you are making practically as much, or how much? Are you making nine-tenths or two-thirds as much?

A When I was going to sea I made around $300.00 a month. Now I make $150.00 to $175.00 in the summer time. In the winter time I don't even make that much.

Q Mr. Boudoin, are you familiar with log entries made in logs on the ships?

A No, sir.

MR. KIERR:

At this time I would like to read the stipulation by Counsel of the entry which was made in the bridge log of the ship, for the date of Friday, November 25, 1940, pertaining to the hours twelve to eight AM.

OBJECTION: MR. WRIGHT:

I object to it at this time. I think the log speaks for itself. I don't see any purpose in reading it to the witness.

THE COURT:

You want to read it to the witness?

MR. KIERR:

Yes, sir, and ask him to identify the use of a particular word, in order to tie the log entry in with his testimony.

THE COURT:

The best thing to do is to ask the question and incorporate the log entry in the question.

BY MR. KIERR:

Q The log entry reads: "Friday, November 25, 1949, twelve midnight to eight AM. Frequent inspections made of mooring, quarters, gangway and deck lights." Can you tell us whether or not the quarters referred to in such an entry, would include the quarters occupied by the crew aboard the vessel?

OBJECTION: MR. WRIGHT:

I object to the question as calling for an answer beyond the scope of this witness relative to entries made by an officer who has not testified in this case. The log entry is here, and we are willing to introduce it in evidence.

THE COURT:

The Court will take judicial notice that the quarters are the same.

BY MR. KIERR:

Q Through what grade did you go in school?

A Fourth grade.

MR. KIERR:

We tender the witness.

CROSS EXAMINATION:

BY MR. WRIGHT:

Q Mr. Boudoin, you were present when Mr. Buckley from the Police Department was here with the record of your being arrested for intoxication?

A Yes, sir.

Q You heard him read some seven cards on intoxication?

A Yes, sir.

Q Do you admit you were arrested on those occasions?

OBJECTION: MR. KIERR:

May I interpose an objection to any testimony concerning matters unconnected with the accident involved in this case, unless he thinks they are matters involving moral turpitude, and in addition thereto carrying convictions.

THE COURT:

Suppose you state the purpose for the record.

MR. WRIGHT:

I think, if Your Honor please, I can show, not only those occurring in New Orleans, but in numerous other places, also occurring aboard the ship, and the man was expelled from the Union, and that was one of the charges of intoxication.

THE COURT:

I want you to state for the record the relevancy.

MR. KIERR:

May I take exception to Counsel's remark with reference to the man being expelled from the Union, and I ask that be stricken from the record.

THE COURT:

What counsel says is not evidence.

MR. WRIGHT:

I think I can combine with that, evidence to indicate or establish that the man possessed a somewhat psychotic personality prior to the incident involved in this lawsuit, and that combined with this aspect or intoxication, he was expelled from the Union. I think such intoxication and over-indulgence can be established from my medical, that it is possible over-indulgence will cause damage to the brain and the nervous system, and cause headaches and dizziness.

THE COURT:

What is the relevancy of it?

MR. KIERR:

I feel that the psychotic issue is not one involved in the case.

THE COURT:

I agree with you on that. The reason I admitted the record on drinking, was because I assumed there was some medical testimony to the effect the complaint this man now has may be attributed to drinking. If that is true, then it is relevant whether this man is a chronic drinker of alcohol, and on that basis this evidence has been admitted, and on no other basis, as I recall. Let's proceed.

MR. KIERR:

Will your Honor take my objection under advisement for further consideration.

THE COURT:

I overrule the objection, because I am certain Dr. Karr is going to say something about that.

BY MR. WRIGHT:

Q And without my taking the time to identify all these cards, you admit you were arrested some seven times in New Orleans for intoxication?

A I do.

Q And some of those occasions were before you went on the MASON LYKES?

A Yes, sir.

Q And others occurred after you got off the MASON LYKES?

A Yes, sir, just about three times after I got off the MASON LYKES. I just about quit drinking. I haven't drank in over a year now -- I haven't got drunk.

Q Do you contend within the past year you have never been under the influence of liquor?

A I never been drunk. I have been working every day, driving a truck every day.

Q What about during the period when you were operating a taxi?

A I spent over a year, over the time I am talking about, since I been working for Joyner Distributing Company, almost a year, and I haven't been drunk since then.

Q What about the period when you were driving a taxi?

A Yes. I drank then.

Q Did you have any difficulty with the Taxi Company becaus

of your drinking while driving a taxicab?

A Yes, sir.

Q Did you have any difficulty with those other employees anywhere that you left?

A None but the taxi company.

Q As a matter of fact, you were in an accident while driving a taxi?

A Yes, sir.

Q Was that connected with drinking?

A No, sir.

Q How many accidents have you had?

THE COURT:

Let's proceed to something else.

BY MR. WRIGHT:

Q Were you ever arrested for intoxication in Mobile?

A Yes.

Q How many times?

A I don't know.

Q Was that prior to going on the MASON LYKES?

A Yes.

Q What about Tampa?

A Yes.

Q What about California?

A Yes.

Q Were those occasions prior to going on the MASON LYKES?

A Yes, sir.

Q Were you expelled from the National Maritime Union --

OBJECTION: MR. KIERR:

I object to the question, Your Honor, as irrelevant and immaterial.

THE COURT:

Let him finish his question. Finish your question.

BY MR. WRIGHT:

Q Were you expelled from the National Maritime Union after you got off the MASON LYKES?

THE COURT:

I sustain the objection. Whether he was expelled from the Unior or not is no concern of yours or mine.

MR. WRIGHT:

If Your Honor please, aside from the aspect of drinking, I think it goes to establish the question of employment since the event on the MASON LYKES. If I can show during that period of time he was not a member of the National Maritime Union, he therefore couldn't get a job on their ships.

THE COURT:

I will let you ask him the question.

BY MR. WRIGHT:

Q Were you expelled from the National Maritime Union after you got off the MASON LYKES?

A Yes, sir.

Q For how long a period of time is your expulsion? How long will you be out of the Union as a result of that?

OBJECTION: MR. KIERR:

I object to that as irrelevant.

THE COURT:

Ask him when he was expelled.

BY MR. WRIGHT:

Q When were you expelled?

A Right after I got off the MASON LYKES.

Q What was the nature of the charge against you?

OBJECTION: MR. KIERR:

I object.

THE COURT:

Unless you can connect it up.

BY MR. WRIGHT:

Q Was one of the charges preferred against you for drinking?

A I don't know. I think so. I didn't pay much attention to the charge. The next day after I got off the MASON LYKES I didn't feel like standing up and arguing with the trial Commissioner.

Q Have you been readmitted to the Union?

A No, sir, and I don't want to.

Q At the time you were on the MASON LYKES, did you hold a ticket with the National Maritime Union, which entitled you to the use of their hall?

A Yes. I have a full book.

Q At that time did you have any book in any other Unions?

A No, sir.

Q Do you have any book in any other Unions today?

A No, sir.

Q The jobs which you took on the three vessels that you named since you got off the MASON LYKES, were permit card jobs?

A Permit card jobs, yes, sir.

Q And those two Unions you mentioned you were with since you got off the MASON LYKES, would issue a permit card because shipping was very good at that time, and all their members were on vessels?

A I don't know if all their members were on vessels, but they couldn't get nobody else. The ones that were not on didn't want to sail.

Q Now on your direct examination you mentioned the fact that when Gonzales came into the room your door was open?

A It was.

Q And the light was on in the passageway?

A The light was on in the passageway.

Q Did you see Gonzales as he entered the room?

A I didn't see Gonzales when he entered the room. I was sleeping or half asleep. I was just going to sleep.

Q At any rate, you remember seeing him in the room?

A When he pulled the box out from under my bed, or touched me,whatever it was, that is what woke me up, and I knew somebody was in the room. I didn't know who he was and I didn't much care who he was. I just wanted to get him out of there.

Q When did you first know it was Gonzales?

A When he hit me, and told me "I'll kill you, you SOB."

Q Didn't you grab him before he hit you?

A I grabbed him at the same time.

Q You didn't have your hands on him before --

A I just grabbed him when he struck me.

Q Did you know it was Gonzales at that time?

A I didn't know who it was at that time.

Q As he started to go out of the door, did you know it was Gonzales then?

A After I threw him down and I saw him, after he told me he'd kill me, then I knew who he was, and when I threw him down I seen him, yes.

Q You think Gonzales was so drunk he didn't know what he was doing?

A I don't think he was so drunk he didn't know what he was doing, because if he didn't know what he was doing, he wouldn't come in my room.

Q He was very drunk?

A He was drunk. I admit that.

Q In fact, I think you said he was drunk when you saw him in the other room?

A Yes, sir.

Q As he went out of the door, did he make any motion towards the fire axe?

A I didn't look. All I done was close the door. I didn't poke my head out to see if the man was going to hit me over the head.

Q As far as you know, he didn't go for the fire axe?

A As far as I know, I don't know where he went. I shut the door. He went forward and got a butcher knife after me.

Q How long did you stay in your room before you decided to go up and call the mate?

A Not very long, a very few minutes, maybe a few seconds, because I was bleeding too bad. I just gave him time to get around the corner.

Q At no time were you unconscious?

A No time at all.

Q Prior to this night that you have been talking about, or this morning, on the MASON LYKES, did you personally ever have any fight on the MASON LYKES?

A I hadn't had any fight with anybody on the ship prior to that.

Q Did you actually see Gonzales in a fight with anyone prior to that time?

A I haven't seen him in a fight. I seen him in an argument, but not in a fight.

Q Prior to that night on the MASON LYKES you are talking about, you at no time saw Gonzales strike anybody on the ship?

A No, sir.

Q And so far as you know, no one ever struck Gonzales?

A As far as I know. The rest of the crew knows he had a fight with Andy Brown.

Q Somebody told you that?

A Somebody told me, yes. I didn't see it. The rest of

them saw it. I know about thirty or forty men ain't going to be wrong.

OBJECTION: MR. WRIGHT:

I move all of that be stricken from the record.

THE COURT:

We haven't a jury here. The Court will disregard it.

BY MR. WRIGHT:

Q As far as you know, at no time did any of the officers on the ship, the captain or other officers, have knowledge of any difficulty that Gonzales had with anyone on the ship?

A Say that question again?

Q Did any officers, so far as you know, have any knowledge that Gonzales had trouble with anyone.

A As far as I know, Mr. Wright, if they didn't know, they just didn't want to know, because everybody else knew it.

Q You are talking about this one incident involving Andy Brown?

A Yes, sir.

Q That happened ashore?

A Yes, sir.

Q You heard that happened ashore?

A Yes, sir.

Q Do you know whether or not Gonzales was ever logged for anything he did on the ship before this occasion when he had this difficulty with you?

A I don't know.

Q As far as you know he wasn't logged?

A As far as I know he wasn't.

Q As far as you know, did he ever miss any of his watches on deck prior to the difficulties he had with you?

OBJECTION: MR. KIERR:

I object to the relevancy of that question, and further suggest the ship's logs and records are the best evidence of what happened.

THE COURT:

I sustain the objection to the last question. I don't see that it has any relevancy to this case.

BY MR. WRIGHT:

Q What was the purpose of Gonzales attempting to get into the room where the captain and the doctor and you were?

A He says he was in there -- he had his sleeve rolled up and said he was going to give a pint of blood. He said: "I just as well give this man a pint of blood. I hit him over the head with a bottle."

Q In other words, he wanted to assist you at that time?

A He just wanted to let everybody know that he done it. That's all he wanted to do.

Q Now after these events that took place that morning, and after you were placed in the ship's hospital, did you have any other contact with Gonzales for the rest of the voyage?

A No, except I seen him when he passed by the hospital door. That's the only time. I never spoke to him.

Q Did he have any fight, or strike anyone after that

time?

A How would I know? I am in the hospital all the time.

Q As far as you know?

A I am in the hospital laying in bed.

Q No report came to you then that he had had any further difficulty with anyone on the vessel?

A No, sir.

OBJECTION: MR. KIERR:

I would like to object to the question as being too general, and ask the Court to instruct him to be specific, to include the fact that Gonzales was placed in irons at one time, because I recall the witness so stating on direct examination.

BY MR. WRIGHT:

Q The reference you made on direct examination to Gonzales being placed in irons, was that based on something you heard, or did you actually see that?

A That is something Captain Townsend told me himself. He said: "I got him in irons."

Q You have no personal knowledge as to why he was placed in irons?

A Well --

Q I mean personal knowledge in the sense you saw something yourself?

A It was generally known he was placed in irons because he wouldn't get sober and was a dangerous character on the ship while he was drunk, and Captain Townsend had to put him

in irons to keep him sober.

Q He remained intoxicated after the events involving you?

A Yes, sir.

Q And the next morning when you saw him in the ship's hospital, he was intoxicated at that time?

A Yes, sir.

Q What type of work did you do before you acquired your ticket to sail through the National Maritime Union, Mr. Boudoin?

A I was a painter.

Q When did you get your ticket with the National Maritime Union?

A You mean my Union book?

Q Your Union book for your right to sail through the National Maritime Union hall?

A In 1945 or 1946 -- 1944.

Q And prior to that time you were working ashore as a painter?

A Yes, sir.

Q During 1943 and 1944, were you doing painting work at that time?

A Yes, sir.

Q You were not in the military service during that period?

A No, sir.

Q Was there any physical disability that prevented you from going in the Army?

A Yes, sir.

Q Or the United States Military Service?

A Yes, sir.

Q Can you tell us what your physical disability was that prevented you from entering the Service?

A Osteomyelitis, in my left leg.

Q Have you had any osteomyelitis since you got off the MASON LYKES?

A Yes, sir.

Q Did you have any treatment for osteomyelitis after getting off the MASON LYKES?

A Yes, sir.

Q Were you in the hospital for it?

A Yes, sir.

Q Were you in the Touro?

A No, sir.

Q Did you receive outpatient treatment from the Touro?

A Yes, sir.

Q For what period of time was that?

A I don't remember, Mr. Wright.

Q How long a period of time?

A I don't remember that either.

Q Did you receive any inpatient treatment at Charity Hospital after getting off of the MASON LYKES?

A Yes, sir.

Q How long were you an inpatient?

A I don't remember how long it was. It was last August.

Q Were you an outpatient?

A I made a few visits and it healed up and I didn't see any need for any further treatment.

Q Had you been discharged fit for duty?

A No, sir.

Q You had been directed to return, but you didn't return?

A Yes, sir.

Q You remember what month that was?

A I don't.

Q It was sometime last fall, of 1952, wasn't it?

A Yes, sir.

Q Now when did you get off the last ship you sailed on?

A Last April.

Q And it was in August of last year that you went to the Charity Hospital as an inpatient for this osteomyelitis?

A I think so.

Q While you were an inpatient at Charity Hospital, did you receive outpatient treatment at Touro? Did you make any further complaint to the doctor with reference to your osteomyelitis?

A No, sir.

Q Since you left the Marine Hospital in February or March, 1950, have you received any further medical attention for osteomyelitis of your leg?

A No, sir. The doctor at the Marine Hospital said nothing I can do with it except to bear it out.

Q The doctor told you to stop drinking?

A Stop drinking and bear it out.

Q Why did he tell you that?

A I don't know. I am not that educated. If he tells me, I follow his advice.

OBJECTION: MR. KIERR:

If Your Honor please, I would like to object to the phrasing of Counsel's question. The Marine Hospital records shows that the doctor noted this man having been told he should get as much rest as possible, and avoid drinking, and Counsel's inflection of his voice makes it appear the doctor admonished this man to stop drinking, and I am confident the record when reviewed, will not bear that out.

THE COURT:

The record will speak for itself.

MR. WRIGHT:

I haven't reviewed that record. I thought he said on direct examination --

THE COURT:

Let's proceed.

BY MR. WRIGHT:

Q I believe you said on direct examination that you had little trouble while you were working in the open, or in the open air. Is that accurate?

A What do you mean by that, Mr. Wright?

Q Is that what you said?

A That I get headaches once in a while?

Q Yes. But when you were working in the open, I believe you said you would get them very seldom?

A Very seldom, not like when I was on the ship in a hot place.

Q I believe you said the main difficulty with your sailing was the fact you had headaches more often while you were in hot quarters in the engine room?

A Yes, sir.

Q When you are working in the open air and not confined to any hot place, you don't have severe headaches?

A I have headaches, yes, but not as bad and not as often.

Q After you made these three voyages in the engine room of the three vessels, did you then attempt to take a job on deck?

A No, sir.

Q Did you make any effort to determine whether or not you could perform work on deck?

A Why should I spend three more years of my life to get a rating on deck when I have already got four or five endorsements down in the engine room? I just as well quit sailing as to go over all that to get another endorsement.

Q Do you need any particular endorsement to serve as an ordinary seaman?

A No, you don't have to have any particular endorsement, but there is no one who wants to be an ordinary seaman all his life. No one that has been out to sea for ten or twelve years wants to go as an ordinary seaman, take all the dirty work and everything else.

Q Would your earnings as an ordinary seaman exceed the

earnings which you are now making selling ice cream?

A It would.

Q Have you actually computed the average earnings you make selling ice cream, or is that just a guess or approximation on your part?

A You have to bring that down in small words.

Q Have you actually calculated the average earnings which you have made since you started selling ice cream, or more or less a guess that it is around $150.00 a month?

A Well, I am more or less guessing it is $150.00, more or less, that is, an average of about $150.00 a month.

Q Aren't there many weeks you make ashigh as Eighty or Ninety dollars a week?

A Yes, sir.

MR. WRIGHT:

That is all.

REDIRECT EXAMINATION:

BY MR. KIERR:

Q How do you explain that some weeks you make $80.00 and yet your average selling ice cream is about $150.00 a month?

A I am putting it, not on a weekly basis, I am putting it on a yearly basis. Some weeks I make Fifty or Sixty dollars. Other weeks I make Twenty or Twenty-five dollars. In the winter time you got three or four bad months, barely make a living.

Q During the winter months do you or not follow that same occupation?

A I do.

Q Do you recall how much you made in that occupation from July through December of last year?

A I don't recall the exact amount, no, but somewhere around $800.00.

Q Mr. Boudoin, can you tell us whether or not you were treated at the Marine Hospital for alcoholism?

A For alcoholism?

Q Yes.

A I never been treated in the Marine Hospital for alcoholism.

Q Did you ever go there when you were intoxicated or drinking?

A I was intoxicated one time when I was there, but I was never treated for it.

Q I show you the clinical history, Part-2, dated in the early part of your admission there, question number three says, under "History. Alcohol, beer, with rare excess", and I tell you that appears to mean when the doctor asked you whether you took alcohol, you told him you drank beer, sometimes to excess. Would that or would that not describe the history which you gave?

OBJECTION: MR. WRIGHT:

Objected to as leading.

THE COURT:

I sustain the objection. It is leading.

BY MR. KIERR:

Q Can you tell us what you told the doctor when he asked

you about the use of alcohol?

A When he asked me about drinking, I told him the truth. He asked me if I drank much. I told him sometimes. I told him the truth. I did drink a lot before. I am not denying I used to drink a lot.

Q Mr. Boudoin, can you tell us whether or not it is necessary that a man belong to a Union in order to go to sea?

A A man does not have to belong to a Union, Mr. Kierr.

Q You know whether or not, for example, the Standard Oil tankers employe men through any particular Union hall?

A No, sir, don't need to at all, except in company halls; that is, no Union halls.

Q Have you ever done any work on deck aboard ships?

A I have taken a couple of ships from New Orleans to Mobile, when they couldn't get other men to take them. I done it as an accomodation to the people.

Q Can you tell us whether or not you are able at this time to perform the type of work required of a man on deck?

A I never was able to perform work on deck, because I don't know it, Mr. Kierr.

Q What bearing, if any, would your headaches and dizziness have on the performance of such work?

A Well, on the work it wouldn't have very much more than it has now, but it is the quarters and the dreams, and everything else. I get nightmares. It is hot in the quarters, sweating all the time, and I get dizzy, and my head starts

hurting me.

MR. KIERR:

That is all.

RECROSS EXAMINATION:

BY MR. WRIGHT:

Q Are you a member of Esso Standard Union or assocication?

A I have never worked for Standard Oil. I have never even been close to one of their ships.

Q When you say you can go to sea without being a member, you mean you have either tc be a member of a Union or some association, such as the Standard Oil association?

A The way I understood it, Mr. Wright, all you have to do is apply for a job, and if they have one they will give you a job, and then they got a little company Union of some kind. I don't know what it is. You don't have to belong to it to sail. Then you can join their Union. It is just merely done for books and things like that. That is the way it was explained to me.

Q Can you sail on any of the ships that you sailed on before you went on the MASON LYKES without being a member of the National Maritime Union?

A No, not on the ships I sailed on, because they belong to the National Maritime Union.

Q In other words, the National Maritime Union has an agreement with the ships of those companies that the crews will be filled by men who are members of the National Maritime Union?

A Not especially they don't have that agreement at all. They have an agreement with the National Maritime Union that they will take new men that the National Maritime Union will send them. They don't have to have a book. You can go with a trip card.

Q Will the Union send a man without a book, as long as a book man is available?

A No, not if one is there with a book available.

Q What about other Unions? Will those Unions permit you to sail if there is a book man available wanting the job?

A Well, Mr. Wright, no Union will give a job to a permit card before they give one to their own Union members.

Q What did you mean when you said you could sail without being associated with some Union, or a member of some Union?

A I can get that trip card, Mr. Wright. I can sit at the hall and wait until after everybody is gone at five o'clock. Maybe I will have to wait for a month and a ship will come in at five o'clock that needs a man; just like in the NMU hall. I seen it done there in the hall.

Q In what period of time did you see it done?

A I seen it a number of times, all the times I was there, not very often, but it does happen.

Q After you got off the MASON LYKES, how long a period of time did you wait before you got a ship as permit man?

A I didn't wait for a ship, to tell you the truth, Mr. Wright. I didn't care whether I went on ships or not the way I felt then. I read in the Paper they needed men to sail ships so bad, so I decided to go back and see if I could still take it. To tell you the truth, I didn't care

whether I went back or not.

MR. WRIGHT:

That is all.

BY MR. KIERR:

Q Mr. Boudoin, subject to the objection which we made concerning the action taken by the Union regarding work, I would like to propound this question. Did you or did you not take an appeal concerning the action the National Maritime Union took?

A I didn't want no appeal.

Q Can you tell us whether or not you had a right to such an appeal?

A I had the same right as the rest of the members there I didn't want to appeal it.

Q Why not?

A When they let people like Gonzales stay in the Union and then bring charges on another man, I don't even want to have nothing to do with the Union any more.

MR. KIERR:

That is all.

OFFER: MR. KIERR:

In connection with the testimony of the witness, I would like to offer, introduce and file in evidence the photograph the witness testified to, marking it Plaintiff-4.

OBJECTION: MR. WRIGHT:

I object to the introduction of this picture for the same reason stated in Chambers when we spoke about it

previously.

THE COURT:

What is your objection?

MR. WRIGHT:

First of all, it has no probative value. The information contained in it --

THE COURT:

You expect to offer the Newspaper article?

MR. KIERR:

I would like to tender in connection with the photograph such Press release as is contained in the issue of the New Orleans States, dated March 6, 1950, which pertains to Manuel Gohzales, and I submit it is relevant for the reason that it would show the reputation of this man in the community, and what we allege to be his vicious propensities. The Court has a right to take judicial notice of the Newspaper release.

THE COURT:

This is almost a year subsequent to the incident in suit.

MR. KIERR:

No, sir, some three months.

MR. WRIGHT:

Wait a minute now. This is March, and the event was in November.

MR. KIERR:

The voyage ended the middle of December, say two and a

half months, about.

THE COURT:

This incident was ashore?

MR. KIERR:

This involves an assault by Gonzales on another man ashore.

OBJECTION: MR. WRIGHT:

I object to those remarks, because I don't think the Press release substantiates that conclusion.

THE COURT:

I sustain the objection to it. If this had been before the incident I would allow it to go in on the question of knowledge, but it happened subsequent to that time and it has to be excluded as hearsay. If you had some proof that this particular man did make this particular assault, then it would be admissible in evidence to show he was a dangerous character. I sustain the objection.

MR. KIERR:

Will Your Honor permit me to file the photograph itself independent of the Press release?

THE COURT:

There can be no objection to the photograph. The Court will allow the admission of the photograph, but not the Press release.

MR. KIERR:

May we designate the photograph as Plaintiff-4, and for identification purposes the excluded part as Plaintiff-4-A.

OBJECTION: MR. WRIGHT:

I object to the introduction of the photograph on the ground it was not sufficiently identified.

THE COURT:

I overrule the objection.

MR. KIERR:

May I ask that the Respondent's representative take the stand for the purpose of identifying the bridge log book entries to which I previously referred?

THE COURT:

I think Counsel will stipulate that these are the log books of the MASON LYKES covering the voyage in question. Suppose you just identify them and give them a number, and introduce them in evidence.

MR.KIERR:

I assume that covers the pages of the relevant entries which I have in mind. There is an entry dated Walvis Bay, Thursday November 24, 1949, which shows at eight-forty PM the longshoremen were away for the night, and thereafter an entry at twelve midnight, an entry showing routine inspection of lines, lights, gangway and all in order, signed by the Junior Third Mate, S. Ainsworth, and the next entry shows that on November 25, 1949, midnight: "Ship laying port side to on dock waiting to load cargo. Twelve midnight to eight AM. Frequent inspections made of mooring, quarters, gangway and deck lights. 7:20 AM. Stevedores aboard resumed loading No. 3 hold and preparing No. 1 and No. 5 holds

for loading of cargo." Signed, H. F. Brock, Third Mate.

I would like to offer, introduce and file the said official entries from the bridge log book, identifying same as P-5. The book is labelled: "Book 3 of 5", relative to the pertinent voyage No. 8. I would be agreeable to stipulating that we substitute in due course, if necessary, photostats, in lieu of the originals.

Further, in "Book 4 of 5", the same voyage, an entry dated Monday, November 28, 1949: "8:00 AM Gonzales, deck maintenance, and C.Carliss, O. S., absent from duty without permission." Signed, Clark Staggers.

I would like to offer, introduce and file in evidence the said official entries from the bridge log book, with the same stipulation that we will substitute photostat copies, if necessary.

THE COURT:

Is that the plaintiff's case?

MR. KIERR:

Your Honor, that comprises the plaintiff's case in this matter, with the exception we may be called upon to have the police record produced, in the event the Press release is excluded. I am of the view that the man's character within two and a half months after he got off the ship, and his propensities, shows he was a dangerous person to have aboard the ship. We would be willing to stipulate that if the police officers were produced they would testify to the facts contained in this Press release.

MR. WRIGHT:

No, Sir, I can't do that, because I have never seen the police record. I do know, however, that when someone else examined it, that the charge was dropped, and I don't believe the matter is relevant in anv event.

MR. KIERR:

We checked and found the matter was nolle prossed because on two occasions when he was called the prosecuting witnesses failed to appear.

THE COURT:

No stipulation is agreed to unless you produce a witness to the alleged assault. You have no evidence on the matter.

MR. KIERR:

Well, I would like at this time to reserve an exception to the Court's ruling in the matter, and state that concludes the plaintiff's case, except for such rebuttal evidence we may be called upon to make.

(Counsel in conference with the Court).

o-o-o-o-o-o-o-o-o-o-o-o

TESTIMONY ON BEHALF OF DEFENDANT:

E. A. JIMISON: Witness, being duly sworn on behalf of defendant, was examined and testified as follows:

DIRECT EXAMINATION:

BY MR. WRIGHT:

Q Please state your name?

A E. A. Jimison.

Q Mr. Jimison, what is your occupation?

A Vice-President, Marine Division, Lykes Bros. Steamship Company, Inc.

Q How long have you been connected with Lykes Brothers?

A For the past twenty years.

Q In connection with your work with the company, do you have anything to do with the personnel service aboard the ships of Lykes Brothers?

A The Marine Division orders the personnel, which I happen to be the head of in our company. We get the required personnel through the respective Unions that we have contracts with.

Q Describe for us briefly the procedure in the industry in filling the complements of the various ships?

A As the steamships require a crew, the Marine Division notifies the respective Unions, whether deck officers, engineer officers, unlicensed personnel, deck and engine department, or steward personnel, and radio officers, and the Union supplies them for employment, and they are referred to the ship for employment.

Q That procedure, what does it grow out of? Is there any kind of working agreement with the Unions and the company?

A There is in existence -- the Union constitutes a collective bargaining agent, and they enter into a contract with the respective companies, and after that contract has been entered into, then you obtain your men under that contract. Preference will be given to employees who are members of that particular Union.

Q Can you hire anyone aboard your ship other than members of the Union that you have this working agreement with?

A Not as long as the Union is in position to furnish them. If they are not able to furnish them, then we have freedom of action.

Q Does Lykes Brothers have any affiliation with the S. I. U. Union?

A None whatever.

Q There was a Union mentioned, the M. F. O. W. Does Lykes Brothers have any relationship with them?

A We have a relationship on vessels we handle as agents, not vessels we operate ourselves or own, only as an agency.

Q Does Lykes Brothers have any relationship with National Maritime Union?

A Yes. We have a collective bargaining contract in effect with the National Maritime Union.

Q How long has that been in effect?

A Since 1937 or the spring of 1938.

Q When the National Maritime Union sends a man to one of

Lykes ships after a request to the Union Hall is made for that man in the particular rating to be filled, under what circumstances does the vessel or its officers have a right to reject the man who has been sent by the Union?

A Providing the man is a qualified man who has a valid Coast Guard certificate and proper endorsements for rating, the officer has a right to reject him only if he has knowledge of some difficulty in connection with this man, like medical disability. Other than that, he is referred to the ship and accepted. We have no jurisdiction beyond that.

Q Do you have Articles that the crew signs upon joining a vessel?

A Yes, shipping articles entered into between the men and Lykes Brothers providing for a voyage for a period of time and back to the United States for a period of time.

Q Anything in those articles that refer to the bringing of alcoholic beverages aboard the ship?

A Yes. I don't remember the exact wording, but it prohibits the bringing of intoxicating liquors aboard, and we have standing regulations in the company that intoxicating liquors or beverages are not to be brought aboard.

OBJECTION: MR. KIERR:

I object to the question because the articles are the best evidence of the information they contain, and I ask that the answer be stricken.

THE COURT:

Do you have a copy of the articles?

MR. WRIGHT:

No, sir.

THE COURT:

You can get a copy of it tomorrow.

MR. WRIGHT

I can subpoena it from the Shipping Commissioner.

THE COURT:

That isn't necessary. Just get a copy of the form of articles.

MR. WRIGHT:

Is Mr. Kierr agreeable to that?

THE WITNESS:

I will furnish a copy of the articles.

THE COURT:

Mr. Kierr, suppose you examine the articles and if they don't contain that information, we will go into the matter further.

BY MR. WRIGHT:

Q Mr. Jimison, have you procured the record from the National Maritime Union on the proceedings instituted against the plaintiff in this case, Mr. Boudoin?

A I have.

Q In December, 1949?

A (Witness referring to document). That is correct, Sir.

Q Did you receive those from Mr. Hugh Flattery of the Maritime Union?

A That is correct.

MR. WRIGHT:

I understand that Mr. Kierr and myself have an agreement that we can introduce this record as being a valid record from the Union of these proceedings without calling Mr. Flattery for identification.

THE COURT:

It is agreed those are authentic records of the Union.

OFFER: MR. WRIGHT:

In connection with the testimony of the witness and the record he has produced, we offer, introduce and file the record in evidence, and ask that it be marked for identification Defendant -15, containing seven pages plus a small red card, and ask the entire record be introduced in lieu of calling Mr. Flattery.

MR. KIERR:

May I say to Your Honor that I have not had opportunity to examine the record until now.

THE COURT:

The Court will reserve ruling on this until you have had opportunity to examine it. Suppose you proceed with something else.

BY MR. WRIGHT:

Q Mr. Jimison, prior to December of 1940 when the MASON LYKES returned to the Gulf from a foreign voyage, did you or anyone in your department, so far as your knowledge is concerned, know or have reason to believe that a man by the name of Manuel Gonzales serving on deck, would give any difficulty on board the ship?

A No --

OBJECTION: MR. KIERR:

I object to the leading form of the question, Your Honor.

THE COURT:

I overrule the objection. Answer the question.

A We had no knowledge of it.

MR. WRIGHT:

That is all, Your Honor.

CROSS EXAMINATION:

BY MR. KIERR:

Q Mr. Jimison, when you say your company employs only members of the National Maritime Union, you don't mean necessarily men who hold books of membership in your Union, do you?

A As long as they are referred to us by the Union, either Union members, trip cards or permit cards, or bona fide Union members.

Q Your agreement with this Union is simply that you will not hire men except through the Union Hall?

A Our agreement is that preference will be given to National Maritime Union members, or men they refer to us.

Q Preference is given to the men coming from the Union Hall?

A Yes. Then we have freedom of action.

Q From the way you put it, I take it that it is no concern of your company whether the men are members of the

Union or not, as long as they place them aboard your vessels?

A Provided they are able and competent.

Q You are combining your own record with the record of the Union when you answered that question. I take it, if someone was sent to your vessel from the hiring hall, if you found him incompetent, you would have the right to refuse to take him?

A If he is certificated for the position we take him.

Q Does your company have final say whether or not you will employ a man? Is the right to exclude him solely within your judgment?

A Medical objection. If he is certificated for the job we take him.

Q What about a person of dangerous temperament?

A We have no knowledge of that, unless we have a record of his previous performances.

Q What do you mean by previous performances?

A Unless he had been fired from previous ships in our company.

Q Do you consider Manuel Gonzales a performer?

A I am not qualified to answer that.

Q You are Vice-President in charge of personnel?

A I am in charge of the Marine Department.

Q That includes the personnel too?

A Yes.

Q You know Manuel Gonzales had some difficulty on the

MASON LYKES?

A I know from those aboard the MASON LYKES.

Q Do you know that he did?

A No.

Q What was the nature of the difficulty, stealing, or what?

A It was a drunken fight, as I understand.

Q Who told you that?

A The record, and the National Maritime Union charges, which I read from this morning.

Q Where did you get the information from your company records?

A From our attorney.

Q As a matter of fact, didn't your ship's captain send in detailed reports concerning these incidents?

A I can't answer that definitely. I have an idea he did. They always do. I didn't personally see the record.

Q Until this time you didn't see it?

A No.

Q So far as you know, this incident resulted from a drunken fight between two men? Can you name them?

A As I understand, one was Manuel Gonzales, and the other man was Boudoin.

Q Do you know Mr. Boudoin?

A No, sir.

Q Do you know Mr. Gonzales?

A No, sir.

Q Who was the accuser in the fight?

A I have no knowledge.

Q Where did the fight take place?

A On board the ship.

Q What part of the vessel?

A I don't know.

OBJECTION: MR. WRIGHT:

I object to this line of cross examination.

THE COURT:

Proceed to something else.

BY MR. KIERR:

Q I show you what purports to be a mimeograph form of two pages, statement of "George P. Townsend, Master, relative to assault upon the person of Elie J. Boudoin, Oiler, by Manuel Gonzales, Deck Maintenance, on November 25, 1949 aboard ship at Walvis Bay, S. W. A." and it is dated December 12, 1949, Voyage No. 8, S/S MASON LYKES, and purports to be the mimeograph signature of your ship's captain Townsend, Will you inspect that and tell me whether or not you recognize that document?

A (Witness referring to document). I have never seen the document before in my life. From my memory I can certify that is the master's signature.

Q Do you recognize that as the mimeograph form used by your company?

A Some ships use ditto.

Q What is this?

A Ditto.

Q That was made aboard the ship?

A Not always aboard the ship.

Q Would this be the first knowledge that you had with reference to Gonzales on that ship?

A That would be the first knowledge that I had of that report.

Q You know that Mr. Gonzales assaulted Mr. Boudoin?

A No, sir, only from what I have heard here this afternoon the short time I have been here, and in offhand conversation. I don't know.

Q What is your knowledge as of this incident?

THE COURT:

What is the purpose of this examination? The witness says he doesn't know anything about it. He doesn't know if those reports came to his office, but they probably did.

BY MR. KIERR:

I will preface it with the next question.

Q Can you tell us whether or not your company has listed Mr. Gonzales as an employee they should accept on its vessels, or whether they list him as one who should be rejected?

A I can't answer that without the records in front of me, but to my knowledge, off hand, he has not been rejected for employment by our company. There is no stipulation on him either way.

Q Why do you say that?

A Because I have no record before me, but I have no knowledge of it if he is rejected for employment.

Q Do you know whether or not Mr. Boudoin is rejected for employment?

A No; but from looking at that record I know we could not employ him, because he isn't a member of the Union.

Q I think we cleared this up earlier. If they would send Mr. Boudoin to your vessel through the hiring hall, even if not a member of the Union, you would accept him?

A That is correct.

Q If he were so presented, would you or would you not accept him for employment?

A We would accept him, but being an expelled member of the Union, I think your question answers itself.

Q I am more interested in the workings of your corporation than the Union. Are you a member of the National Maritime Union?

A No, sir.

Q Does your organization have a procedure, so to speak, black listing seamen?

A No, sir, no, sir. We have a list of men that are medically unacceptable to us, but I don't like the word "blacklisting". We don't recognize it in our company.

Q I mean by that colloquial term, do you have a list of men in your company you would not accept for employment, because of their vicious temperament and bad character?

A Not under such a heading. No, we don't.

Q Anything approaching it?

A That goes back to my previous expression of performance, drunkenness, muggles smokers, knife throwers.

Q How about bottle wielders? Do you know what I mean by that?

A I think I know what you mean, but I don't think we have any such term as that.

Q You mean if you had a seaman aboard your ship stabbing a man with a knife, you wouldn't put him on the list?

A We would ask the Union to put him on the list. We don't handle it ourselves.We write the Union.

Q How about a seaman who stabbed another with a piece of glass instead of a knife?

A In all probability refer that to the Union, and ask them not to refer the man to us in the future.

Q Will you tell me whether that has been done with regard to one Manuel Gonzales?

OBJECTION: MR. WRIGHT:

I object to something that took place after the events in this case.

THE COURT:

Objection overruled. Answer the question.

A I can answer that, Mr. Kierr, not to my knowledge.

BY MR. KIERR:

Q As a matter of fact, Mr. Jimison, hasn't Mr. Gonzales been employed aboard your vessels since he was on your Mason Lykes?

A Mr. Kierr, I can get the record of it and tell you every

day he was employed, but I can't tell you from here.

Q Isn't it a matter of fact Manuel Gonzales was employed aboard your S/S John Lykes in January, 1953, and you told that to Mr. Flattery?

A I believe we did, yes.

Q Do you customarily have medical doctors examine seamen before joining your vessel?

A At the time they sign on and the time they sign off.

Q That is to determine whether or not they are physically fit to perform the duties which they are assigned to?

A That is correct.

Q Would that not apply to Mr. Boudoin when he joined the ship, the MASON LYKES?

A Yes.

Q He wasn't rejected at the time he joined your vessel, to your knowledge?

A Not to my knowledge.

Q Has your company taken any disciplinary action regarding Mr. Boudoin?

A Not that I know of.

Q Was he logged for any ill-conduct aboard your vessel?

A I would have to review the log book and the master's report. If you have the master's report there, it will most likely reflect it, or the log book.

THE COURT:

I think it is already in evidence.

MR. KIERR:

Not yet, Sir.

THE COURT:

If it is going to be put in evidence, then there is no point in having this witness read it. I can read it.

MR. WRIGHT:

Everything asked in the last fifteen minutes is in the log book.

BY MR. KIERR:

Q The document you just handed back to me is the master's report to you, which we previously discussed?

A Yes. It bears his signature.

OFFER: MR. KIERR:

I offer in connection with the testimony of the witness, the statement, marking it Plaintiff-8.

OBJECTION: MR. WRIGHT:

I object to the statement, subject to the reservation that if it is the same statement the witness used to refresh his recollection, I waive the objection.

THE COURT:

I overrule the objection.

BY MR. KIERR:

Q You stated some rule or policy about bringing Alcoholic beverages aboard vessels?

A We have a company rule to that effect, and that is signed by the captain.

Q They cannot bring it on the ship?

A That is correct.

Q Isn't there a limitation --

A No, sir.

Q You mean any ship man who has a drop of alcohol on one of your vessels is violating that rule?

A That is correct.

Q Do you have any incidents in your files where officers have done that?

A Yes.

Q Have you suspended or fired each of your ship officers in such an instance?

A Yes.

Q You mean if any ship officer was ever found to have any intoxicants aboard one of your vessels, in every instance his employment has been terminated by your company?

OBJECTION: MR. WRIGHT:

I object to the question as beyond the scope of the direct, and is irrelevant to the issues in the case.

THE COURT:

You brought it out on direct. However, I think the matter has gone far enough. Let's go on to something else.

BY MR. KIERR:

Q It is not unusual that crew members bring wine, brandy, or some cordial aboard for the purpose of souvenirs, to bring back to the States?

A They do that practically on all vessels.

Q Your company condones that?

A We don't condone it, but we can't stop it.

Q If a man presented a problem, as alcohol aboard your

vessel, are your officers required to enter that in the ship's log?

THE COURT:

That is a broad question. Be more specific.

BY MR. KIERR:

Q To reduce it to simple terminology, if a man would bring intoxicants to use aboard ship, such as would interfere with his duties, what disciplinary action, if any, would be taken by your ship's officer?

A Confine him to quarters and logging him.

Q By logging, you mean he is fined part of his pay, and an entry made in the log book concerning that disciplinary action?

A That is correct.

Q Can you tell us whether such logging was made in regard to Mr. Boudoin?

A I cannot.

Q You can't deny that no such logging was made to his having a bottle of wine, or cordial, or brandy in his quarters?

A I have no personal knowledge of this case, except a smattering, and hearsay.

Q Do you know if such a log entry was made with reference to Mr. Gonzales?

A I do not.

Q I refer you to page-22 of the Official Log Book of the MASON LYKES, and askyou to read the entries pertaining

to Manuel Gonzales, if you will?

OBJECTION: MR. WRIGHT:

I object to that. We have gone through this log book several times. We admit this is the official log and the entries have been submitted in so far as definite statements as to what the men actually saw, and I object to those things based on hearsay.

THE COURT:

There is no point in having this witness read it. I can read it.

THE WITNESS:

I have never seen that log book.

BY MR. KIERR:

Q During the discussion you had opportunity to see that page, and notice the entries?

A I didn't read it.

THE COURT:

I can read it. What is your point in asking the witness to read it?

MR. KIERR:

It is a question of whether or not this company had knowledge, or should have known that Mr. Gonzales was a person of bad character and dangerous propensities, and I want to show that even though they had knowledge, they permitted him to sail on their ships.

THE COURT:

It is already in. Let's proceed to something else.

BY MR. KIERR:

Q If there are no log entries against Boudoin, then you have no criticism?

OBJECTION: MR. WRIGHT:

I object.

THE COURT:

Proceed to something else. He hasn't criticized anybody.

MR. KIERR:

No further questions.

REDIRECT EXAMINATION:

BY MR. WRIGHT:

Q I just want to ask you, Mr. Jimison, did you receive any report from the Union with reference to their findings on the investigation they conducted against Mr. Boudoin?

A Yes.

Q Other than the report received as a result of this lawsuit, did you receive any report at that time?

A Not at that time, until I made an investigation.

BY MR. KIERR:

Q You are unfamilar personally with any of the facts or other allegations which may be contained in this socalled Union record?

A Not familiar with them at all.

MR. WRIGHT:

That was the very thing I thought we had ironed out about this socalled Union record.

THE COURT:

It is stipulated those are the authentic records. You

haven't had any ruling on the admissibility of the records.

MR. WRIGHT:

I have introduced the records.

THE COURT:

You offered them, but they have not been admitted in the minutes.

BY MR. KIERR:

Q Mr. Jimison, when was the first time you received these records?

A Part yesterday and part today.

Q And when was the first time you discussed those records?

A Your question again?

Q When did you first learn about the socalled Union record?

A Yesterday, March eighteenth.

OBJECTION: MR. KIERR:

Needless to say we object to the introduction of the documents identified as Union records.

THE COURT:

I will rule on the objection in the morning. I want to look at the records.

OBJECTION: MR. KIERR:

I object to the testimony of Dr. Corales being taken.

THE COURT:

I sustain the objection to Dr. Corales' testimony being taken.

Let the record show that the offer of the testimony of Dr. Corales is withdrawn.

Court recessed until 2:00 PM, March 20, 1953.

MARCH 20, 1953: 2:00 PM.

OBJECTION: MR. WRIGHT:

I object to this subpoena duces tecum filed by Mr. Kierr.

THE COURT:

Mr. Kierr, objection is being made to your subpoena duces tecum. Will you state the purpose of the subpoena. Are you familiar with it?

MR. KIERR:

Yes, sir. I filed it.

THE COURT:

Are you acquainted with this number one?

MR. KIERR:

Yes, sir. I think I filed it this morning.

THE COURT:

I don't think it is necessary to talk about it right now. I think it is relevant to show whether or not the steamship company has employed Manuel Gonzales since the time of this incident.

MR. WRIGHT:

In that connection we had asked Mr. Kierr if he would not agree to a stipulation that the information which we received from Mr. Flattery is to the effect that Manuel Gonzales is still a member in good standing of the National Maritime Union, and I understand it, we will make such a stipulation, and in connection with that I am willing to facilitate matters by stipulating that he has been employed.

THE COURT:

Any question that Gonzales is a member of the Union?

MR. KIERR:

Not that I know of, Your Honor, but my understanding that he has probably served on eight of Lykes Brothers ships since the Boudoin incident.

THE COURT:

I understand that, and I think it is pertinent to this inquiry. I think it is also pertinent to determine whether or not he is still a member of the Union in good standing. If we can get the information by stipulation, then we should have it, otherwise, you will have to get it from the witness.

MR. KIERR:

It is my understanding he is still in good standing in the Union.

MR. WRIGHT:

Suppose we stipulate Manuel Gonzales is still a member in good standing in the National Maritime Union and has been employed on vessels of Lykes Brothers since his service on the MASON LYKES.

THE COURT:

I assume you will have to put the record in there.

MR. WRIGHT:

I can do that.

MR. MARTINEZ:

We would be willing to try and find out what ships he sailed on, and for what period of time he sailed. Then that part will speak for itself.

THE COURT:

What is the other part?

MR. KIERR:

I had asked Lykes to produce all records pertaining to his man subject to the return on the original subpoena yesterday.

When I returned to my office last night, I found some answers to interrogatories in Civil Action No. 3473, wherein it was also an assault case. Lykes Brothers said they maintained a card file which set forth information concerning all accidents, illnesses, misconducts and assaults. It was certainly my intention to have all that produced at the outset of the trial. They didn't mention anything like that, so in this subpoena I spelled it out so there would be no doubt.

Mr. Jimison is the Vice-President in charge of operations and personnel, and he said yesterday he was not familiar with this. I am inclined to think the witness Beyer is.

MR. WRIGHT:

I don't see the relevancy of dealing with others than the men involved in this case.

THE COURT:

Do you want the records as to any others than the men involved in this incident?

MR. KIERR:

No, Your Honor.

THE COURT:

As I understand this case, it is a relevant question as to whether or not the defendant had any knowledge that might be relevant as to the character of Gonzales. It is also relevant to determine just what is the character of Gonzales as to the belligerancy, also to determine whether or not the defendant makes any effort to keep people of such character off their ships.

All of those are relevant inquiries on the matter here, as under the Keen case or other cases that may arise which involve that ruling. I realize you want to make an issue of this case, so possibly you may get a different ruling from the Fifth Circuit than the Second Circuit made on the Keen case.

In that event, I think it should be shown that the attitude of the defendant is to seamen the type of Gonzales, if the record should show that Gonzales is actually a belligerent character.

MR. MARTINEZ:

I agree that anything we have with respect to Gonzales probably would be relevant, but on the other hand, I believe Mr. Jimison testified on cross examination what the policy of the company was as between the defendant and the Union. Now if they want a witness to come down here and reiterate what Mr. Jimison has already said was the policy of the company, and if that is what the Court feels should be done, we want to comply with it, but I want to stress here

that there should not be produced in this Court, for any reason other than that one, any records they may have pertaining to other men. I don't think that is pertinent to the case. If the Court wants a witness here to tell what the practice of the company is in it's relationship to the Union, and the hiring, or refusing to take men on their ships, I will then have such a witness here.

THE COURT:

I think Mr. Jimison testified to that generally. Now I think the demand here is to determine whether or not anything has been done pursuant to the policy which Mr. Jimison testified to.

MR. WRIGHT:

In so far as Gonzales is concerned.

MR. MARTINEZ:

What are we going to confine it to?

THE COURT:

Mr. Kierr, you say you will be satisfied with the record with reference to Gonzales?

MR. KIERR:

And Mr. Boudoin.

MR. WRIGHT:

That is satisfactory.

THE COURT:

Suppose you state what records you think you are entitled to.

MR. KIERR:

I am interested in the record showing all dates of

employment by Lykes.

MR. MARTINEZ:

We have that already.

THE COURT:

That is number one. What is number two?

MR. WRIGHT:

That is extremely difficult to get. We have his Coast Guard record.

THE COURT:

Mr. Martinez says he has it.

MR. WRIGHT:

We have the Coast Guard record, but we couldn't go through the files of all of their ships.

MR. KIERR:

Doesn't that cover 1949?

MR. WRIGHT:

Yes.

THE COURT:

That can be stipulated.

MR. MARTINEZ:

Number one is taken care of by the Coast Guard records.

THE COURT:

Put in a letter from the Coast Guard what ships he sailed on.

MR. WRIGHT:

That would be equally unavailable.

THE COURT:

Then you will get it from your records, whichever way you want.

MR. KIERR:

Also the records maintained in their possession, giving the names of the unacceptable persons, including those who may come to them through the Union hiring hall, including such a list pertaining to Gonzales and Boudoin, in so far as it pertains to belligerency or incompetency, from 1949 to date. I assume they have a list alphabetically arranged. If it is a card system, perhaps not pertinent for me to inquire about Paul Jones.

THE COURT:

Mr. Jimison covered that yesterday, that the company did not keep any such records, that the matter was taken up in individual cases with the Union.

If you want to determine whether or not the company sent to the Union any communications with respect to Manuel Gonzales or Elie Boudoin, then I will require the company to produce them.

MR. KIERR:

In Civil Action No. 3473 they state under oath they do have such a list. Mr. Jimison said he preferred not to call it a black list. He said they would not employ the men because of having been involved in a fight --

MR. MARTINEZ:

That is not correct.

MR. KIERR:

May I get Civil Action --

MR. MARTINEZ:

I would be very glad to produce a witness to explain probably a little more in detail than Mr. Jimison has, the relationship between the Union and Lykes with respect to men they consider undesirable, and under that arrangement, except in certain specific cases probably where they have grounds for it, the Union is the one who makes the decision as to their members in the Union with respect to their membership. In other words, Lykes recommends to them in certain instances where they are to consider not sending them back to their vessels, and it is not as dogmatic as presented here. I should be happy to have the relationship developed a little more in detail to the satisfaction of the Court. I would be glad to put a witness on to confine it to that, and these two particular men.

THE COURT:

I think Mr. Jimison is in a better position to testify as to the relationship with the Union. He has testified, and I think his testimony is accurate and correct. My recollection is Mr, Jimison testified there was no such list, each matter was handled individually with the Union by letter. Counsel requests any communications relative to Gonzales and Boudoin, if you have those records.

MR. MARTINEZ:

If any such records.

THE COURT:

That is what he wants to know.

MR. MARTINEZ:

My recollection is Mr. Jimison said last night there wasn't any.

THE COURT:

I think he also testified that would not come within his sphere of the detail work.

MR.MARTINEZ:

That is correct, but I would be willing to produce any letters.

THE COURT:

Mr. Martinez is going to produce now any letters which may have been sent to the Union by Lykes Brothers, in which Manuel Gonzales or Elie Boudoin are named with reference to behavior on board Lykes vessels.

MR. KIERR:

Yes, sir.

THE COURT:

It seems to me that will take care of your problem, when you fit that into Mr. Jimison's testimony of yesterday to the effect there is no such list.

MR. KIERR:

Your Honor, in the case of Anthony Durke, No. 3473, Civil Action, which is being handled actively with my associate and my office, we filed interrogatories in 1952, the ninth question of which reads: "State each and every

instance of misconduct reported to respondent's officers, agents, or employees concerning the said Claudius Jones during any periods of his employment by respondent, giving the dates, places, and times of such instances and where and how they are recorded in respondent's records or files."

The answer to the interrogatory is not in the file. However, in our office files we have what purports to be answers to our interrogatories and purported to be signed under oath, wherein they give the information about assaults, and said to have come from a card file intheir office for that purpose. There is a companion suit in Admiralty, and the answers may be in that suit.

THE COURT:

If there are any such answers in the other suit, you can make those answers a part of this record. What else is there in the request?

MR.KIERR:

A record of all the logging of fines imposed upon either party, Gonzales or Boudoin.

MR. MARTINEZ:

I don't have that. We brought in the official log dealing with Gonzales.

MR. KIERR:

Mr. Beyer is in the Court room. Possibly he could answer that.

MR. WRIGHT:

Dr. Karr is still waiting. He waited two hours yesterday afternoon.

THE COURT:

You can take Mr. Beyer later. Call the Doctor.

...ooOoo...

DR. HOWARD H. KARR: Witness, being duly sworn on behalf of defendant, was examined and testified as follows:

DIRECT EXAMINATION:

BY MR. WRIGHT:

Q Please state your name?

A Doctor Howard H. Karr.

Q What, if any profession do you practice, Doctor?

A Neurosurgeon.

Q Would you state for us, Doctor, what university you graduated from?

A Jefferson Medical College in Philadelphia, 1932 class.

Q Would you state for us your qualifications in the field of neurosurgery?

A I am certified by the American Board of Neurosurgeons; on the Board of Neurosurgeons at L. S. U.; consultant neurosurgeon to the Veterans Hospital in New Orleans; Chief of the service at Touro; member of the staffs at Touro, Baptist, Hotel Dieu, and Senior visiting surgeon at Charity Hospital.

Q How long have you been engaged in the field of neurosurgery?

A Since 1933.

Q And during what period of time have you been actually engaged in the practice of that phase of medicine?

A Well, from an academic point of view, I was actually engaged in the practice as an instructor at the New York Neurological Insitutute, starting in 1939. I was engaged in the practice subsequent to that in the Navy, having charge of the Service Base Hospital No. 15, at the U. S. Naval Hospital at Portsmouth, and following my discharge from the Navy, in private practice in New Orleans.

Q During that period of time, were you mainly confining your practice to the field of neurosurgery?

A Exclusively.

Q Do you belong to any honorary societies in connection with neurosurgery?

A Yes, my certificate from the American Board of Neurosurgeons, besides passing all examinations conducted by the American Board.

Q Did you have occasion to examine the claimant in this case, Elie Boudoin, Doctor?

A Yes, on two occasions, on August 15, 1950 and March 16, 1953.

Q Were there any material differences in the two examinations and findings?

A None.

Q Will you please state for us, Doctor, what history you were able to develop from the patient prior to your clinical examination?

A On August 15, 1950 the patient gave the history as follows, on Thanksgiving day of 1949 he was hit by a bottle in the region which he indicated to be the right

mastoid and right parietal region. He stated he was struck by a whiskey bottle. He declined to mention the reason for being struck, because of instructions from his attorney. This happened aboard the ship, while the ship was tied up at a port in West Africa. He stated that his scalp was cut at the time he was struck, that he was seen by a doctor who happened to be a passenger aboard the ship, approximately fifteen minutes after the accident occurred, that the doctor didn't question him, but "tied the veins and sewed it up".

He stated that according to the doctor's instructions he was confined to bed for the remainder of the trip which terminated on December 19, 1949, that he was confined to bed because he was having headaches and that the headaches occurred in the region that he previously described as the site of the cut in his skull, and that he had no other symptoms while aboard the ship.

He further stated that the accident occurred while he was on his bunk, and after he was struck he reported it to the mate, who in turn reported it to the captain, and the captain called the doctor, who directed the patient to the hospital for treatment, which was carried out. Upon return to the States, he went to the Marine Hospital, but was not admitted to the hospital, and according to his statement was not given any treatment. He was told to go home and rest.

He stated he reported to the hospital once a week, that

during the time he was going to the hospital, his symptoms consisted of headaches and dizziness. He was unable to define the term dizziness, but merely referred to the fact that on walking up steps he would get dizzy and fell weak. He described the headaches as a "steady smooth pain", and that the headaches continued, therefore, in February of 1950 he was admitted to the hospital for approximately one week; that while in the hospital he had a spinal tap and x-rays, but otherwise he had no specific treatment at that time, that is, at the time I saw him on August 15, 1950.

He stated that his symptoms were no better or no worse since the accident happened, and that in spite of the treatment that had been carried out, the symptoms persisted unchanged, as previously described, and they constituted the current chief complaints. Now that was the history given on August 15, 1950.

On March 16, 1953, on reexamining the patient, he indicated on this occasion that he was hit over the head with a bottle, as he previously stated, that the man was trying to steel a bottle of whiskey which he had underneath the bunk, and he got up and grabbed the man, and the man then hit him over the head with the bottle of whiskey, which was full. He got the man down and struggled with him, and as a consequence he received a cut over his right eye. He then got up and ran to his room -- the man got up and ran to his room, and then the patient locked his door for fear the man might come back. He then went to see the mate,

because his scalp was bleeding.

He repeated the story about going to the Marine Hospital, where he was treated in the Outpatient Department. The story changed in this sense, that he was going to the hospital because of headaches and dizziness, and indicated that the head was hurting above the ear in the temporal region on the right side. He stated at first his headaches would last a day or two instead of continual, as previously related, and that at the present time, on March 16, 1953, that he didn't get headaches very often, approximately once a month, and when he did get them they would last sometimes as long as four or five hours, and described them as a dull pain, not hard enough to go to bed.

He also indicated that he was not under any medical treatment at the time I saw him, and further stated he had not received any form of medical treatment since April of 1950, at which time he was told by someone at the Marine Hospital, that further treatment was not required.

In 1950 he worked for a while in the Sanitation Department in New Orleans, and then made a couple of trips by ship, and then started to work for the Melba Ice Cream Company as a truck driver, where he was working at the time.

He gave this history, that he was twenty-seven years of age and at the time of his episode on board ship, he was a fireman and watertender. He denied any previous serious injury, except a sprained back in the Texas City disaster, and also recurrence of bone infection in his leg, which occurred many years ago during childhood. He

had been called up for military service and was classified as 4F. That was the history obtained on both occasions.

Q Doctor, would you describe for us please, the neurological examination which you conducted and the findings in connection with your neurological examination?

A Briefly, the patient had a complete neurological examination, which type of examination is characteristic of the examination of the skull and spine, and then the cranial nerves, and then the motor system, and then the sensory system, and then the reflexes, and then the sympathetics. That is the outline of a neurological examination, and the type of examination carried out on this patient.

The neurological examination on this patient revealed locally that there was a scar which extended from the mastoid region behind the right ear, upward to the mid parietal region, a distance of approximately 3-1/2 inches, just behind this, and paralleling it was another scar which was approximately two inches in length. Both scars were well healed. There was no associated underlying bony depressions. The scars were not adherent and were well covered with hair. There was questionable hypesthesia to pin prick, which could not be established completely. The remainder of the neurological examination was completely within normal limits.

Incidentally noted were scars on his left lower leg which evidenced an old bone infection, which at the time of the last visit showed evidence of draining and apprently

examination, laboratory studies which may be indicated, and x-rays; air injection of the brain; spinal fluid examination, and under certain circumstances possibly brain wave.

Q Are those four adjunct tests you mentioned significant in any type of brain injury, or certain phases where they are more important than others?

A Yes, certainly more important in other cases, depending upon what the nature of the injury was in the first place, what immediate disability has been produced.

Q In reference to Elie Boudoin, do you know whether or not electroencephalograms were carried out on him?

A I was aware of that fact. However, as far as I am concerned, whether or not they had or had not been taken on this patient was not material to the situation, would not be an influencing factor in appraising any neurological disease, or residual.

Q Do you feel the neurological examination which you conducted, combined with the history you obtained from the patient was adequate to reach the conclusions you made?

A Yes.

OBJECTION: MR. KIERR:

May I object to the leading form of the question.

THE COURT:

He has answered the question. Don't lead the witness.

BY MR. WRIGHT:

Q Doctor, with reference to the nystagmus of the eyes,

can you state whether or not such a condition can be caused by something other than brain injury, and if so, tell us what conditions would play a part in such movements of the eyes?

A Nystagmus is a type of involuntary movement, rhythmic movement of the eyeballs, which can be an impression of a large number of things. There is the essential nystagmus that a good many people have without reference to any neurological disease, and for that reason referred to as essential; the use of sleeping tablets at night the following morning nystagmus will be disclosed. The presence of certain types of tumors in the brain may produce nystagmus; simply irrigating the ear canal with cold water for a matter of five seconds will produce nystagmus; spinning in a chair will produce nystagmus. Does that answer the question?

Q Is it necessarily an irreversible condition?

A I don't quite understand you.

Q Does this condition fluctuate in different people at different times?

A Oh, yes.

Q Suppose you find a patient that has a type of nystagmus to the eye, what part, if any, would it play in making a diagnosis of the brain injury?

A Nystagmus as an expression of brain injury per se would not be significant. It would only be confirmatory of other forms of neurological disabilities which occur, that is, clumsiness of the extremities, lack of coordination, which

is an expression of injury to the coordination senses, known as the cerebellum in the brain. Nystagmus, just as an isolated occurrence cannot be considered as being indicative of anything, unless associated with other neurological disability, that is to say, if an individual has clumsiness of extremities, having difficulty in maintaining his balance. If you look at his eyes and watch the movement of his eyes, the muscles which move the eyeballs are no different to the muscles which move his hands, and the hands which move clumsily, due to poor coordination, will result in the eyeball muscles moving the eyes in an eye jerk fashion. To pick up an isolated term of nystagmus and say just what it means, you must qualify that. I can't qualify it.

Q With reference to Elie Boudoin, in your examination did you find any neurological signs which could be the basis of his complaint of headaches and dizziness?

A No, sir.

Q Can headaches and dizziness result from the excessive use of alcohol?

A Well, I have heard some of my friends complain of that, by excessive use of alcohol. I feel confident it can.

Q Suppose a person drinks to excess over a long period of time, can it cause any material damage to the brain, making a person have intermitting headaches?

A Well, it can happen, but the influence that alcohol has, as far as the nervous system is concerned -- it may produce it -- I don't say it always does. Alcohol may produce

serious mental deterioration, and in a chronic alcoholic, that deterioration may produce what is known as alcoholic psychosis, but the damage usually done by alcohol is pretty serious as far as the central nervous system is concerned.

Q Can it actually do damage to the brain?

A Oh, yes. Alcohol can poison the brain.

Q Is there anything else that will affect the brain following acute alcoholism?

A Acute alcoholism will produce a swelling of the brain, which we refer to as edema of the brain, and what the layman commonly calls "D T" delirium tremens. There may be other manifestations. You have evidence of bilateral wrist drop, or bilateral foot drop.

MR. WRIGHT:

That is all, Your Honor.

MR. KIERR:

May I request opposing Counsel to supply me with a copy of each report? I have tendered mine.

MR. WRIGHT:

You have the original.

MR. KIERR:

I have only my one copy.

BY MR. WRIGHT:

Q Will you let him look at the original?

A (Hands document to Mr. Kierr).

CROSS EXAMINATION

BY MR. KIERR:

Q Doctor, I believe you sought to inquire the reasons

requiring further treatment, but with no problem for this examination.

Q Was that the neurological examination that you conducted in August of 1950, or are you referring, Doctor, to both examinations as a whole?

A That is a neurological examination. The examinations were carried out in 1950 and 1953 and both neurological examinations disclosed the same findings. There were no neurological deficiencies. They were normal, with the exception of the scars which I mentioned.

Q As a result of the history which you obtained from the patient and from the neurological examination that you conducted, did you reach any conclusion with reference to whether or not the patient was suffering from neurological disability as a result of the alleged trauma of November, 1949?

A My conclusions on August 15, 1950 were that the patient had not sustained any intercraneal trauma, that he had no neurological deficit, and if a term were to be used to express the condition from which this man had suffered, that term would be laceration of the scalp, and at the time of the examination then be termed a healed laceration of the scalp.

Q What was your conclusion after your examination of March 16, 1953?

A My opinion remained unaltered; the same.

Q Doctor, in connection with your examination or examinations of Elie Boudoin, did you find any evidence of

nystagmus of the eyes?

A No, sir.

Q Did you make any test to indicate any difficulty in the patient?

A In April, Babinski. There was no Babinski sign.

Q Did you find any noticeable disfigurement of the patient's face?

A No disfigurement, no, Sir.

Q Did you notice anything that would be considered significant with reference to his face, or anything that would be abnormal, not necessarily significant?

A There is nothing abnormal about this man's face. It is noticeably asymmetrical and the reason for it is obvious when you look at his back, he has a slight curvature of the spine, resulting in one shoulder being lower than the other, and nature compensating an individual like that, instead of walking straight he is lopsided, and the head begins to automatically assume an asymmetry. That is a very common condition, and I don't believe it has any relation to this man's injury.

Q Doctor, is there any general recognized criteria of determining whether or not someone is suffering from brain damage?

A You say brain damage. That doesn't mean a great deal, just by saying brain damage.

Q What I am driving at, is whether or not there is any significance, residual or significant brain damage

resulting from a traumatic injury to the head, are there any recognized standards within the field of neurosurgery?

A Yes.

Q Can you name some of the things which the medical profession and field of neurosurgery look for and feel are significant in making diagnosis following a head injury or head trauma?

A This applies to all cases of trauma. No case can be considered simply as an individual, without knowing anything about his history. There must be a reconciling of all facts pertaining to his case, the history, actually the mechanics of the production of trauma, the clinical course the patient follows after the injury, and then a comparison of the neurological status of the patient when you examine him compared with the neurological examination immediately following his injury.

The occurrence of an injury does not mean that damage has been done, and that it is irreversible. The question of responsive disability was obtained by the neurological examination of the patient, with the objective findings in connection with the case. The objective findings vary. You may have a patient who has a compound skull fracture. A case of that kind would involve knowing whether any bone fragments inside the head, or any pressure. The objective findings are largely a matter of what applies to the individual case, but the production of the responsive disability is based upon the history and the neurological

that Mr. Boudoin was struck on the head by a bottle. I take it that had no relevancy to your examination, did it?

A I was only concerned about the mechanism of the production of his trauma. That was the only concern I had.

Q You did ascertain that he was allegedly struck on the head with a bottle, which he told you was full?

A He said a full bottle of whiskey. That is what he told me.

Q Did you ask Mr. Boudoin whether he used intoxicants at all?

A No.

Q Do you know whether he does?

A No.

Q Did anyone tell you that he does?

A Mr.Wright told me by telephone the other day that this man had a record of having been picked up for the use of intoxicating liquors on a number of occasions. That is the only knowledge I have of the use of any alcohol.

Q Was that before or after your examination?

A I didn't inquire.

Q I mean when Mr. Wright told you that?

A Before or after --

Q Your examination of Mr. Boudoin?

A Oh, before my physical examination? I believe it was after -- I am not sure. I think when we made the appointment for the examination. I am not positive about that.

Q It could have been before your examination of March

sixth?

A It could have been. I am not certain.

Q If you knew that information before your last examination, you nevertheless, did not discuss it with Mr.Boudoin?

A Not at all.

Q Is it because you felt --

OBJECTION: MR. WRIGHT:

I object to these questions. He testified he doesn't know whether I gave him the information before or after the examination.

THE COURT:

You asked him on direct examination if he felt alcohol had anything to do with it.

BY MR. KIERR:

Q Do you feel, Doctor, the use of alcohol has anything to do with the plaintiff's complaint?

A I didn't feel it as a neurological condition, and I don't think the neurological condition I found had anything to do with alcoholism.

Q Wasn't there hyperesthesia in the vicinity of his scar?

A No, sir, I didn't mention that.

Q I thought you said --

A I said hypo-esthesia.

Q What does that mean?

A It means if you make a cut in the skull, such as we do during many operations, you only cut across sensory nerves, and in case of scars may have a little reduction

in sensation.

Q You found that here?

A I found a questionable small area just in front of his scar.

Q And that could result in reduced sensation of a nerve?

A Sensation of a fiber. It is not a main nerve.

Q When you referred to the man having asymmetry, you are referring to the position of the entire head with relation to the lower part of the body?

A No, sir.

Q I understood you to say the head would assume a level position, even though there may be a curvature in the spine as a result?

A All I said was this man has a face not the same on both sides, and that is due to the natural consequence of one shoulder being a little lower than the other, which required some curvature in the back, and if you look at this patient you will see what I refer to, which is not unusual. That is a very elementary type of thing to tell you about medically.

Q It was my impression that you were convinced yourself that the man has some curvature of the body, which caused one shoulder to be lower than the other?

A No, sir. I didn't say that. I said he had curvature of the spine.

Q If the spine does not remain straight, I take it the head would then be at an angle with regard to the level

of the ground instead of perpendicular?

A Frequently, yes.

Q And to compensate for that, nature caused the man's head to move to a perfectly vertical plane so his eyes will be level?

A With equillibrium in the appearance of the face.

Q Will you explain to me what you refer to, and how that occurs?

A Stand up, Mr. Boudoin.(Mr. Boudoin before the doctor). You will notice here his right shoulder is over a little more than his left, and looking at his back you will find a little curve in his back, which produces the rotation of the spine, so one shoulder is down and the other is up. One part of the cheek on one side is flattened. It is a little more prominent on the other side. It is a curvature without medical significance. It is a type of thing most of us have. Some of us have it more than others. You look at this man you will find his chin developed a little, and the cheek bone appears a little more pronounced, prominent, but his eyes are fundamentally horizontal.

Q You mean the prominence of the cheek bone could be affected by the lack of asymmetry in the shoulder region, and compensation of the head, if a defect in the spine?

A It is no problem so far as this man is concerned. It doesn't relate to this accident, required no treatment, and for any extraordinary force which worked in producing this, I think you might get more information from an

orthopedic surgeon.

Q Will you tell me in what particulars the face is not normal?

A I didn't say the face wasn't normal.

Q Well, asymmetry, if that is the word?

A Excuse me. If you will take the asymmetry of one side of your face, Mr. Kierr, and take a mirror and look at your face, you will find your face is asymmetric, so is mine and everybody else's.

BY THE COURT:

Q What Mr. Kierr wants to know if any muscle paralysis?

A No, sir. This man has no seventh nerve involvment. There is no involvment.

BY MR. KIERR:

Q Did you test him for muscle tone?

A Yes, that is, one of the craneal nerves.

Q Did you observe any muscle tone in the muscles of the face?

A Oh, yes.

Q Will you tell us whether or not there is any difference on one side as to the other?

A If you look at him now you see a little deeper drooping here. (Indicating).

Q Which is the lesser?

A As he stands there now, the right one appears to be the lesser. I don't think it is of any significance, or any consequence, the fact he has a deeper wrinkle on one side

to alter the muscles of his face.

Q Did you notice any drooping at that time of the upper lip on one side as compared to the other?

A No, I think perhaps he seems to have a little larger lip on one side than the other.

Q Which is larger?

A It appears to be the right side.

Q Is it possible, Doctor, that an injury to the cerebellum could cause the loss of muscle tone in the face?

A The cerebellum has nothing to do with the muscles of the face, nothing.

Q What part of the brain is the muscle paralysis?

A The seventh nerve.

Q Is that at the back of the head?

A No. It comes out; a stem.

Q That is the lower part of the head?

A No. If you project a point just beyond your throat, and in the roof of your mouth is where you find the origin of the seventh nerve.

Q Would you point at it with your finger from the back of your head, Sir?

A You have to project it to a depth, to a point approximately one inch deeper than the level of your mouth, the posterior wall, back wall.

Q How about the eyes? Does the cerebellum have anything to do with them?

A Nothing.

Q Can nystagmus result from an injury in that area?

A What area, Mr. Kierr?

Q I mean of the cerebellum, the back part of the head, or, if I am not correct, Sir, I mean the part where Mr. Boudoin was injured. Is that the cerebellum?

A Well, I would like to point out the area where he was injured is not the area.

Q Is that the vestibulocebral part of the brain?

A No, sir.

Q What is it?

A The mastoid region and posterior parietal region. The cerebellum is not there at all.

Q Where is it?

A The cerebellum is at the base of the brain, about that deep (indicating), two inches in from here, because these muscles are all attached to the base. The skull curves in like that, (indicating), and the mastoid is covered by muscles, and then at this point you have your cerebellum. (Indicating).

Q Doctor, it is possible, is it not, for a person to sustain injury to that cerebellum area and --

A Oh, yes, you can get injury to any part of the brain.

Q I had not quite finished the question, and I will amplify it by asking you whether or not that is possible when a man is struck by a full bottle at the place where Mr. Boudoin was struck?

A I am sorry. I didn't hear your question.

Q Assuming that Mr. Boudoin was struck by a full bottle

at the place of these scars, would that not be a competent cause of injury in the area you have disclosed?

A I am sorry. I still don't know what area you refer to.

Q The cerebellum or parietal area?

A No, sir. It would be a little remote from it, from his scars.

Q Let's break it down, Doctor. Is there any nystagmus which can result from trauma?

A Yes.

Q What is it called?

A Penetrating cone showing wound passing through the cerebellum, is an example.

Q Would you say it would be impossible for the cerebellum to sustain injury which would result in nystagmus, other than by penetration?

A- No.

Q How about a blow with a bottle?

A Well, I am sorry I have to go into this lengthy description, but I don't mean any offense by this, and I am not trying to make a doctor out of you, but any sort of damage that may result from a blow in that region, would require a detailed comprehension of the mechanics of the force when the blow is received, and contrary to general belief among lay people, the damage that may result from a blow to one side of the head is not produced at the side where the blow is applied, because you have in the skull a homogeneous mass of tissues floating in a bed of fluid, which moves at a different rate of speed than -- it moves

at a good rate of speed in the skull itself. When the brain moves, it is like walking up to a bucket of water and kicking it. When you kick that bucket you don't have to move it, but the contents of that bucket may overflow, so that you will receive a blow on one side of the head, and you expect the damage to occur on the opposite side, and in the base of the skull itself.

When you speak about a man receiving a blow which involves a consideration of the parietal of the skull, unevenness of the base of the brain, the stress is produced within the brain itself, plus these following factors.

Movement away from the side; movement of the opposite side; uneven character of the skull and parietal, producing extortion, and with a severe blow the neurological signs produced are easily determined and speak for themselves, and can be easily accounted for.

Q From the history you gave, Doctor, it impresses me that a lot of things may have gone on inside of Mr. Boudoin's head when he was struck by a bottle which was full, and struck hard enough to break the bottle and do the damage displayed by the scars there. You disagree with that?

A Yes, I do very heartily. I think you are applying some of these statements I just made to this situation. If you want to discuss the changes which were produced in this particular situation, I think the history of the case and the clinical findings speak for themselves.

Q What about his history? What did you learn from the

history, which indicated that no intercraneal trauma was sustained?

A There are a number of things. Number one. This man received a blow and was not rendered unconscious. This man got up --

Q Will you explain the reason for that being so important to you, Doctor?

A Can I answer one of these at a time?

THE COURT:

Finish your statement, Doctor.

A The significant thing in this man's history was the fact he was not rendered unconscious. That is obvious from the history and what he himself had described; no major neurological deficiency had been produced, because if there had been one, he would not have had the physical capacity to cooperate with that particular situation, nor run to the purser.

The other pertinent thing in the history was the fact that subsequent to his injury, there is nothing to indicate he had any disability. It is true he had some complaint of headaches and dizziness, but no indication in the nature of paralysis or loss of consciousness, or anything else.

The next significance is this man was treated adequately, and in fact he received extensive treatment and observation subsequent to his arrival in the United States.

The significant thing in the history was, that the examination disclosed no disability. And the last thing, just as important, is the fact this man has not sought

or received any medical treatment subsequent to the time he was discharged from the Marine Hospital. I am talking about medical disability, and that is the only concern I have here, but those things are pertinent from a medical point of view.

As far as explaining the fact this man was not rendered unconscious, don't forget the skull has been placed on human beings for one purpose, and that is for protection, and the only comment I have is this man's skull worked admirably for him, because all he got out of it was a lacerated scalp. He didn't even sustain a fracture.

Q How do you know he did not sustain a fracture?

A I inquired at the Marine Hospital, and the x-rays taken on this man were negative, and subsequent information from Mr. Wright -- the question might come up for just this reason, you might say: "Did you x-ray this man?" And for the record, I would like you to know that I had personal knowledge of his x-rays. I didn't order any x-rays on him. Whether he did or did not have a fracture per se, would not alter my opinion.

Q When did you examine the x-rays?

A I have a copy of them here. (Witness referring to file). Yes, dated 12/29/49, x-rays of the skull, and the report shows no evidence of bone injury.

Q You referred to the x-ray report? You didn't examine the x-ray plates yourself?

A I am not a roentgenologist. I am a neurologist.

Q Do you ever examine x-rays?

A Always.

Q If you had a private patient with a head injury, and you referred him to a roentgenologist for x-rays, would you or would you not examine those plates?

A Sometimes. It all depends upon the problems involved.

Q Didn't you just say you always examined them, Doctor?

THE COURT:

Let's proceed to something else.

BY MR. KIERR:

Q You decided to rely upon this abstract at the Marine Hospital, and you had none made at your own instance?

A When I was asked to see this patient I was given carte blanche to get any data to substantiate any opinion I had on the matter, or arrived at, regarding such problems. I didn't feel additional x-rays were required on this man, and didn't order them, even though I had the opportunity of doing so, and I would like further to point out the fact, if the x-rays of this man had disclosed a fracture of the skull; we don't treat a man for fracture, we treat him for intercraneal injury.

Q How about the electroencephalogram? Did you take one?

A No.

Q What was the source of your information that made you aware that he had taken one?

A Dr. Posey.

Q Did you speak to him about it?

A Yes.

Q Did you examine the wave chart?

A Not at all.

Q Did he tell you what he did?

A Yes, he did, nothing.

Q Did you discuss Dr. Posey's examination of this man with Dr. Posey?

A Yes.

Q Did you agree or disagree with his findings?

OBJECTION: MR. WRIGHT:

I object to the question. We had a discussion about this very subject, with Mr. Kierr and Dr. Posey, and Dr. Posey and Mr. Kierr decided he was not going to call Dr. Posey. Now he is trying to bring out Dr. Posey's findings.

THE COURT:

I think you admitted the report on the electroencephalogram.

MR. WRIGHT:

Only the report. The Doctor here testified as to the findings of the electroencephalogram.

THE COURT:

What is your statement, Mr. Kierr?

MR. KIERR:

I want to ascertain from the witness what he learned from Dr. Posey's report.

MR. WRIGHT:

You see now --

THE COURT:

Just a minute.

Q Did you learn anything from Dr. Posey to form an opinion in this case?

A No, sir. I wouldn't have used the electroencephalogram on this patient. In fact, I knew two of them had been carried out. I inquired about it.

THE COURT:

I think the Doctor stated that he knows the electroencephalogram showed nothing, according to his statement, and that is as far as we can go at this time. If you want Dr. Posey, you can produce him.

BY MR. KIERR:

Q When did you ascertain the information regarding the electroencephalogram?

A I believe on his first examination. No, just a minute. I think the examination here was in August, 1950. (Witness referring to record). No, it was at a subsequent date, because the electroencephalogram was not taken until December of 1950, as I recall.

Q Did you know that Dr. Posey had made these electroencephalograms at the request and expense of Mr. Boudoin himself?

A No. I didn't inquire.

Q How do you know he made them?

A I really don't recall. Dr. Posey and I talked about a good many cases, and as a matter of fact, I knew about this electroencephalogram sometime ago, and when I was told

this thing was going to be called a few days ago I called his office and asked his secretary what the report was, and she told me.

Q Did you know that Dr. Posey had been employed by Mr. Boudoin himself?

A I didn't inquire, and I didn't know.

Q Did the defendant who employed you in this case tell you that Dr. Posey had examined this man?

A No. As a matter of fact, my information didn't come from that source at all with respect to the electroencephalogram.

Q Was it purely an accident that you found that out?

A I don't know. It was only an incidental thing and not pertinent to the examination, as far as I was concerned.

Q You cannot get an electroencephalogram with a tumor of the brain?

A You can get a tumor of the brain and still get an electroencephalogram.

Q Have you contemplated the possibility that this man may have some disease, such as a malignant tumor?

A Mr. Kierr, there is nothing in this man's history, or any of his clinical findings which would resemble, suggest or even imply the possibility that this man had a brain tumor, no evidence of it in his examinations.

Q How did you determine this nystagmus test, or did you?

A We have that part of the cranium space examined?

Q How did you do it?

A Have the patient follow an object with his eyes, and you observe the eyeballs.

Q Did you observe whether he has any nystagmus at all?

A He has no nystagmus.

Q None in any direction at all?

A No, neither laterally, or upward, or rotary.

Q Is there a significance, Doctor, in the difference in speed, in the components of nystagmus?

A Which components do you refer to here?

Q It is my understanding if the patient has nystagmus the eyeballs will jump one way and then return back to the other way. Is that it?

A Nystagmus --

Q Oscillating, you said?

A Yes, jumping movement of the eyeballs.

Q Suppose one of the movements is fast and the other is slow, does that have any significance?

A It is referred to frequently as a fast component or a slow component, but has no local significance.

Q What do you mean by that?

A Evidence of something wrong in a specific area of the brain.

Q You mean a person with oscillating nystagmus have various components, one fast and one slow?

A I am sorry, but I don't understand your question.

Q If Mr. Boudoin has a nystagmus where one oscillating movement was fast and one slow, you would say that has no

significance whatsoever?

A That is what nystagmus is. They all have fast components in one direction.

Q You mean there is no such thing in medicine where there are two fast components and two slow components?

A They are always different.

Q And no emphasis is made in medicine with regard to a noticeable difference between the two?

A It is just described as fast components to the right or left. That is all.

Q And if you saw a patient, for example, have a quick movement when looking to the right, when the eyes moved away from the midline, and a slow movement when the eyes returned to their position, would you say that is characteristic of nystagmus?

A You may have a fast movement to the other side.

Q Doctor, I don't believe you answered my question. Is that characteristic of all such oscillations of the eyes, regardless of their cause?

A All nystagmus have fast components. The fast components may be to the right or to the left.

Q Suppose I put it to you this way, Doctor. Is it not true that if you have an oscillation where the eyes move in a quick phase away from the midline, and a slow movement coming back, doesn't that indicate it is of the vestibular type of nystagmus?

A No.

Q Doctor, are you acquainted with the doctor known as Dr. Samuel Brock?

A No. I don't know Dr. Brock.

Q You have heard of him?

A Yes.

Q Is he a recognized authority in the field of neurology?

A Yes.

Q Was he ever connected with any of the universities with which you are connected?

A No.

Q Have you ever attended the New York University, or have any connection with Dr. Brock, or hear about the Bellevue Hospital in New York?

A No.

Q If I told you Dr. Brock is a Neurologist connected with those institutions, would you say they are credible institutions?

A Oh, yes.

Q I show you a book titled: "The basis of Clinical Neurology ", written by Dr.Brock - -

A Before you go any further on this -- Your Honor, I would like to tell you on the question of nystagmus you will find a number of descriptions and fundamentals. Considering the whole problem, to take up one isolated sign of that kind and try to attach significance to it, makes no sense, and there are many different opinions and theories regarding the origin of nystagmus. We all know it is

connected with the c enters of coordination, and may be an expression of a number of things, and to pick it up as an isolated finding and say it is based on that one isolated finding, that it represents the expression of one specific disease, is impossible for Dr. Brock or anybody else who has written a text book, or any accredited neurosurgeon with which I am familiar to say.

Q From the comments you just placed in the record, am I to infer that you disagree with Dr. Brock before you know what he said?

A No. I am trying to put this thing in the proper prospective. I think this, that you are a little puzzled about this. However, I don't expect you to be a doctor, but in view of the fact you keep returning to the subject, you feel it is some thing that is par excellence, and I want to put in the record that nystagmus as such, is not a sign of anything in particular, any more than some people blush at times and other times do not blush. You are using the nystagmus sign for expression of some particular disease. Have I made myself clear?

THE COURT:

We understand it, Doctor. You are saying nystagmus standing alone does not indicate anything?

A Precisely.

BY MR. KIERR:

Q It is an objective sign?

A Yes.

Q Not something that can be simulated?

A Yes.

Q It is an involvement of the oscillation of the eyes, I believe you said in your direct testimony, if my memory is not too puzzled?

A If you said the train rode a telephone post, that is voluntary nystagmus.

Q So if I look at you, and you are in that chair, and if my eyeballs move, that is nystagmus?

A No. I didn't say that. It is a movement from one point back to the other.

Q Let's see whether or not you agree or disagree with Dr. Brock. In the treatise I mentioned, at page 123--

MR. WRIGHT:

I don't know that we are trying a jury case. I have read some text books on this thing. If we are going to read --

THE COURT:

That is the approved way of cross examining an expert. I didn't hear any objection to it before.

BY MR. KIERR:

Q I show you under the title "Nystagmus", there is a definition reading: "The rhythmic oscillation of the eyeballs known as nystagmus in the most interesting of reflex oscular movements. It is so intimately related to the vestibular apparatus that it will be discussed at this point." Do you agree or disagree with that, Sir?

A It is connected with the vestibular apparatus?

Q Intimately?

A It is believed that there are connections with the vestibular apparatus.

Q Intimately related?

A That is a matter of definition. It is not as simple as that.

Q Further reading: "The following types of nystagmus are described dependent upon the afferent source of the abnormal ocular reflex movement: (1) vestibular, (2) ocular, (3) optico-motor." What is meant by vestibular type of nystagmus, Doctor?

A The term "vestibular" is a lever entirely for that group of cases where it is believed that the occuring of nystagmus originated; the distribution of the vestibular of the ear, the center nerve system.

Q How about ocular?

A I gave you an example of that before. It originates in the eyes.

Q And optical-motor?

A That is a kind of reflex connection between the visual centers, the reflex pathways which are set up between the cerebellum and the eyes, so called righting reflexes -- to give you an example -- where an animal is put on his side, his head will tend to right itself so he can see straight, a matter of association of the eyeballs, and that is due to a complicated reflex momentum, which is connected between

the eyes, between areas of coordination, and visual centers, a very complex problem.

Q In fact, any nystagmus can have a bearing on a person's equillibrium?

A No, not at all.

Q By equillibrium, I mean a person's ability to maintain balance --

A Nystagmus is not a function of coordination.

Q You mean persons are not inclined to become dizzy if they have a serious case of nystagmus?

A I know a large number of people who have nystagmus that are not dizzy.

Q Would you say it is entirely harmless and would have no effect at all?

A Nystagmus has to be considered in conjunction with the picture of the neurological manifestations.

Q If a person had nystagmus resulting from trauma and had headaches, wouldn't that be objective?

A No. I see no relation between headaches and the existence of nystagmus.

Q Is it possible headaches could result from brain injury and damage?

A That has occurred.

Q Is it not possible that headaches from nystagmus could like wise result?

A Absolutely.

Q It is possible that brain injury or damage could have

both of those signs?

A It could.

Q And one supports the other in such a case?

A Not at all.

Q When I say support, I mean they would not be incompatable signs?

A They are not related at all.

Q I say they are not incompatable signs?

A They may occur together, but not related.

Q Is it possible for a blind man to have nystagmus?

A Oh, yes. In fact, they usually do.

Q What related, or type is that?

A It is usually rotary.

Q In which of these three classifications does it fall?

THE COURT:

This is all very interesting, but let's go back to this case. Let's get on with this case. I let you use the book as long as it pertained to this case, but let's get along with it.

THE WITNESS:

Mr. Kierr, I don't know whether you are -- whether by this exposition, you are attempting to suggest that my familiarity with this subject is questionable, but I feel compelled to remind you of the fact my opinion in some of these matters has been highly regarded by you in the past. I don't think any of this business you have been talking about is pertinent to Mr. Boudoin's case, and I think you

have questioned me along this line in connection with cases you asked me to see.

If you want a neurological treatise on this, let's start, but if you want my opinion with regard to this patient, I wish you would get along with it, because I have some patients waiting for me.

THE COURT:

Mr. Kierr, let's get along with this case. We have long explanations on both sides.

BY MR. KIERR:

Q Reading further: "In the vestibular variety there is a quick phase in which both eyes move away from the midline, and a slow movement in which both eyes resume tneir mid-position. From the course of the rapid movement, one defines the directional qualification of the nystagmus, as right or left, upward or downward, etc. It is believed that the slow phase is due to the irritation of the vestibular apparatus, whilst the rapid movement is believed to be due to the activity of higher supranuclear mechanisms, partly cerebral." Do you agree or disagree with that?

A Dr. Brock doesn't give any positive statement on the fact there. He says he believes, and that there are a number of ways about it, and he states so.

Q Do you still maintain if there is a quick phase one way and a slow movement the other, that it has no significance?

A I repeat what I said to you before, I cannot use an isolated sign of nystagmus and say it is significant.

Q I take it, there is nothing I have read you from Dr.

Brock's book with which you disagree. Is that correct?

THE WITNESS:

Your Honor, I don't quite understand this --

BY THE COURT:

Q Do you agree with that last statement: "It is believed?" Do you believe that?

A I believe part of that. Period.

THE COURT:

Let's proceed.

BY MR. KIERR:

Q You mind telling me the part you don't agree with?

A The fact it is vestibular.

Q How about paragraph (2). "In ocular nystagmus there is an inability to fix the eyes on an object because of oscular defect. The movement of the eyes is usually horizontal and both phases of the movement are quick. It is seen in the blind, in albinism, in various forms of retinal disease and in various intoxications (barbital group, quinine chloroform, alcohol, nicotine, lead, etc.)" What part of that, if any, do you disagree with?

A Nystagmus is necessarily characteristic.

Q How about any type of nystagmus which may be due to the use of alcohol: "both phases of the movement are quick". Do you agree with that?

A No.

Q You disagree with that?

A Yes.

Q Doctor, if I told you the Marine Hospital made a diagnosis, would you know what that diagnosis is regarding Mr. Boudoin?

A I don't know that they made any diagnosis outside of what I see in this copy of their abstract.

Q And what is that?

A As a matter of fact, I don't remember. (Witness referring to documents). The one dated 3/3/50 which says diagnosis of concussion. Disease none.

Q Do you agree that Mr. Boudoin sustained a concussion?

A No, sir.

Q You disagree with that?

A Yes.

Q I wonder, Doctor, whether or not you think there is any such thing as a concussion?

A Yes. There is a very real thing.

Q But you disagree with that diagnosis?

A Yes.

Q Did you have that at the time you made your examination?

A Yes, because when the examination was originally requested, those copies were attached to the letters making the request for the examination.

Q You didn't mention in your report that you disagreed with the diagnosis of the Marine Hospital?

A In fact I didn't even discuss the Marine Hospital's report. I was not asked to express an opinion about the Marine Hospital. I was asked to give my own opinion about

this man.

Q Would it be a simple matter for you to make a test to determine whether or not Mr. Boudoin has nystagmus at this time?

A Oh, yes, very simple.

Q Would you do so?

A Yes. (To Mr. Boudoin). Look at this pencil, if you will, please. There is a nystagmus movement now in this man's vision on the other side. Look over there. Keep looking at this. Keep on looking, keep on looking, keep on looking.

BY THE COURT:

Q He has nystagmus on the right, but not on the left?

A He only has a fixed lateral gaze and it is not sustained. (To Mr. Boudoin). Look at this pencil. Don't look at anything else. You see how he falters and stops, and starts again. This man does not have nystagmus, and I can determine possibly in your own eyes. If you will stand here, I will try to tell you what your own eyes would do. (To Mr. Kierr) Look at this pencil. You jerk your right eye.

MR. WRIGHT:

I have had nystagmus since birth. You want to go over mine too. I have had it since I was born.

BY MR. KIERR:

Q Did you notice fast and slow in Mr. Boudoin't nystagmus to the right?

A It looks like nystagmus, but it isn't. He doesn't have a sustained nystagmus in this Court room.

another doctor, Dr.Posey,whom I did not believe would be called to testify because of the agreement we had made,I am wondering if it is permissible for me to ask the Doctor whether or not he had the patient examined by two neurologists, and what their findings were.

THE COURT: It would not be admissible. Let's proceed with the redirect.

MR. WRIGHT: No questions.

BY THE COURT:

Q Do you believe that the Babinski sign can prove nystagmus?

A No, sir.

Q Do you believe that a trained nerrosurgeon or neurologist could be mistaken in determining if a patient had Babinski signs? Is it easy to elicity,or difficult to elicit?

A It involves the determination of evaluation in one spot and determining it in another spot. Stimulus is applied and you have a withdrawal. If I walked up to you and stuck you with a pin, you would withdraw. It must begin at the outer aspect and cross the base of the toe. The Babinski signs are important signs,and it is not a difficult test to illustrate, but you must know you are dealing with a particular area of the body and be careful. If you want to support your contention that you have a positive Babinski, you can do what is known as a shadowgram which elicits the same responses. If you have a true Babinski, your conformatories will be apparent, but if you don't have a true Babinski, your conformatories will be negative.

o-o-o-o-o-o

Q Did you observe what he has now, when he was in your office?

A He didn't have nystagmus at any time I examined him.

Q What you saw today, the second time you used this pencil, was the first time you observed these twitching movements?

A That type of movement can be produced in anyone. Someone says this patient has nystagmus. You look at the patient and find he has nystagmus jerks. Unless in a sustained situation, it is not nystagmus.

Q What do you mean by sustained?

A It is constantly present.

Q It was constantly present?

A That is not so. When this man looked to the right he had a few jerks and stopped. The second time he looked, he stopped and started again. With true nystagmus he could not do that. He could no more fix his eyes than you could hold your hand out here for fifteen minutes. This patient does not have nystagmus.

Q Would you tell me whether or not Dr. Brock states in his book that this is nystagmus?

A I can't tell you what Dr. Brock says.

Q Would you like to find it in this other treatise?

A I am not interested in that. I am here to express my own opinion.

Q Nothing I read you said it occurred only when the eye was moving?

A I have no intention of making a doctor out of you and telling you what the facts are, as I understand them, know them, and practice them, and it is my opinion.

Q If I told you --

THE COURT:

Let's don't start with another doctor. Let's proceed with this one here.

BY MR. KIERR:

Q Would you say he has this nystagmus movement on the right lateral gaze?

A I simply say this patient does not have nystagmus, and I never observed him having nystagmus.

Q These oscillations which we observed a moment ago, which, when he looked to the right had fast and slow movements, are not in your opinion nystagmus?

A I stated that when this man's eyes moved from his right to his left, the movement of the eyeballs was regular. When he fixed his eyes on a gaze to the right there were a few unsudden nystagmus jerks.

Q I establish then, Doctor, that your description--

THE COURT:

Don't testify. You are not under oath. The Doctor is under oath.

MR. KIERR:

We tender the witness.

MR. WRIGHT:

If Your Honor please, in view of Counsel's remarks with reference to the fact that the claimant was examined by

CLYDE E. BIGGERS: Witness, being duly sworn on behalf of defendant, was examined and testified as follows:

MR. WRIGHT:

This gentleman is from the Marine Department of Lykes, and he is willing to answer Mr. Kierr's questions with reference to Lykes records on Gonzales and Boudoin.

THE COURT:

He wants the records, and I want the records.

MR. WRIGHT:

As I understand it, he has no records for either one of these two men.

DIRECT EXAMINATION:

BY MR. WRIGHT:

Q Which department are you connected with at Lykes Brothers?

A Marine Division.

Q How long have you been connected with Lykes Brothers?

A Since 1920.

Q And what is your capacity with Lykes Brothers?

A Assistant Manager of the Marine Division.

Q Do you have any personal knowledge of an incident that occurred aboard the Mason Lykes involving a man named Manuel Gonzales, and the plaintiff in this case, Elie Boudoin?

A I do not.

Q When the MASON LYKES returned to New Orleans in December of 1949, were any reports handed in to you, other

than the reports which you have turned over to me?

A I know of none. All reports we have, have been turned over to Mr. Beyer, who I believe, turned them over to you.

Q Do you have any record in your Marine Department pertaining to an incident which occurred aboard the MASON LYKES?

A No, sir.

Q Do you have any letters directed to you, or any department of Lykes with reference to the incident, either from the captain or any of the other officers?

A No. To my knowledge we don't have any.

Q Did you learn of this incident aboard the vessel?

A I heard about it, yes, sir.

Q When you heard about it, did you or did you not make any type of investigation, independent investigation in connection with what took place on the vessel?

A At the time I didn't make any personal investigation, but I called in Mr. McDougall, agent of the Union at that time, and they investigated and gave me a full report.

Q Was there any reason why you called Mr. McDougall?

A Yes, because previous to this time, in fact it was in September that we had several discussions regarding seamen on board our vessels that we considered undesirable.

Q What was the nature of these discussions? Why did you have these discussions?

A With reference to the Union to take disciplinary action, handle decisions in certain cases.

Q Were these discussions from any desire on the part of Lykes with reference to either leaving men on their ships, or taking men off their ships?

A It was with regard to taking men off the vessels.

Q And can you state the outcome of those discussions with Mr. McDougall?

A As a result --

OBJECTION: MR. KIERR:

I object to hearsay testimony as to what transpired. I think Mr. McDougall should be here to state what they were.

THE COURT:

Don't testify to what Mr. McDougall said, but you can state what the result was of these discussions, what procedure you set up, and what actually happened as a result.

A As a result I received a letter from Mr. McDougall, and I answered Mr. McDougall's letter.

Q What happened?

A We go along with the Union in disciplinary actions, except in certain cases where we have instances of murder cases, stealing, assaulting an officer, and matters of that kind. I also give Mr. McDougall at that time the names of the men we had on our "Don't reemploy" list, that we didn't want, and in accordance with our understanding, I left for a period of some months the matter of disciplinary action in minor cases with the Union. I generally write the Union and tell them to keep them off of our

vessels, and as a result of that the Union makes an investigation.

BY MR. WRIGHT:

Q Was there any agreement, as a result of these letters, and these talks you had with Mr. McDougall, was there any agreement with reference to what should be done in the case of one unlicensed man assaulting another unlicensed man?

A I didn't quite get that, Mr. Wright.

Q Was there any agreement made as to what procedure should be followed if a situation arose where one unlicensed member of the crew assaulted another unlicensed member of the crew, when it didn't grow out of any business on the vessel?

A In a personal matter between two crew members, the Union would take action on that.

Q Was that agreement entered into prior to November of 1949?

A Yes. That was in September, 1949.

Q What, if anything, happened when the MASON LYKES returned to New Orleans in December, 1949, with reference to the events that had taken place between Gonzales and Boudoin?

A In this particular instance I didn't take any action as far as writing the Union and telling them not to reassign them, because the Union wrote they would investigate this case and take disciplinary action.

MR. WRIGHT:

That is all, Your Honor.

CROSS EXAMINATION:

BY MR. KIERR:

Q Captain, did you bring copies of those letters with you?

A I believe our attorneys have them. They are in the files.

Q Did you give them copies of those letters in connection with the Boudoin case we are trying now?

A Did I do what?

Q Did you give them those letters in connection with this case?

A Well, not necessarily in connection with this case. It was in connection with the subpoena we got today. That was part of the record.

MR.KIERR:

May I ask for the production of the letters which the witness refers to.

MR. MARTINEZ:

Q Do you have them with you?

A Yes, sir. (Witness referring to documents). Here is Mr. McDougall's letter and my letter.

BY MR. KIERR:

Q Captain Biggers, you were informed that the hiring hall through which these men were assigned to your vessel -- or the Union -- would not assume the responsibility of determining the acceptability of those men who were unfit in your department to be aboard your vessel?

A That is stated in Mr. McDougall's letter, I believe.

Q In other words, can you tell me whether or not you consider that you were delegated the responsibility for determining the acceptability of these men to the Union?

A I don't feel that way about it, Mr. Kierr, because the Union at that time was in accord with this agreement we had made, doing a particular job of checking on personnel. They investigated some few cases before this. We also reserved the right, if the Union didn't decide the way we wanted them to decide, we reserved the right to reject these employees, and in this particular case Mr. Boudoin's papers were taken up at that time by the Union.

Q When did you learn that?

A I don't know just what time that came up.

Q As a matter of fact, wasn't it just one or two days ago?

A Certainly not.

Q You have any company records showing that?

A No, verbal.

Q Do you have any independent recollection of when you learned that?

A At the time this came up, the Union informed me they would have a hearing --

Q Do you have an independent recollection of it?

A In this particular case I don't know. I am taking this as a Union case, bring a man up on charges -- I am assuming this man here -- my understanding when the Union wants to try a man, they take up his papers and hold them pending

trial.

Q You are now assuming. Do you know it or are you assuming it?

A I am assuming it.

Q Then you don't know of your own knowledge whether the Union has taken disciplinary action on Mr. Boudoin?

A No. I was notified of that verbally.

Q Then it isn't an assumption. It is a positive recollection?

A Positive recollection they were going to take action. Mr. McDougall notified me verbally they were going to have a hearing on this, and investigate it, and I didn't do anything at all on this case, because it was through the Union.

Q You have positive recollection of discussing this matter of Mr. Boudoin with Mr. McDougall?

A Not personally, but we did talk to him on the telephone. I mean, I didn't talk to him person to person, but I did talk to him on the telephone.

Q Was he on one end of the telephone and you on the other?

A Yes, sir.

Q What date?

A I don't know.

Q When did the MASON LYKES arrive back here?

A I say within a few days. They advised me the case was tried and Mr. Gonzales was not to blame, and they reversed the first opinion on that charge. It was my

opinion at first Mr. Gonzales was to blame, and an investigation was made by the Union, and they changed this information I had.

Q What was the source of your information?

A Port captain on the ship. I didn't go down to the ship.

Q You mean those statements of your master and mate, and various other statements attached?

A No. I referred to the port captain. I would have to check what port captain handled the vessel. We have three or four port captains.

Q It was your conclusion, as representative of the Marine Department of Lykes Brothers, from the investigation which your company made, that Mr. Gonzales was the aggressor and to blame in this assault?

A I can't answer that truthfully. I don't remember that.

THE COURT:

He just testified to that.

BY MR. KIERR:

Q You had been informed by the Union they would investigate any matters about which they were notified from your office in writing? For example, it says in this letter: "When a letter is submitted from your office regarding the conduct or the failure on the part of one of our members carrying out his full duties, etc., we will go into the case thoroughly with the member involved, and he will be penalized either in the way of a fine or by not being

permitted to re-ship aboard company vessels for a given period of time, depending on the nature of the charges."

MR. WRIGHT:

These letters have been produced as requested in the subpoena served at twelve-thirty. I haven't had an opportunity to look at them. I think they ought to be in evidence and not read isolated portions of them.

THE COURT:

I assume they will be submitted inevidence. If Mr. Kierr doesn't offer them, you can do so.

BY MR. KIERR:

Q Is that not correct?

A Restate your question?

Q Wasn't it customary in your company complaints were submitted by you in writing?

A Also notified them by telephone. They do that now, have been doing it for some time.

Q Did you write them about Mr. Gonzales and Mr. Boudoin?

A I did not.

Q Is Mr. Gonzales still aboard your vessels since then?

A Yes.

Q How many vessels?

A I would have to look at my records on that.

THE COURT:

Didn't he give you the list?

MR. KIERR:

No, Your Honor.

MR. MARTINEZ:

We gave him the Coast Guard list. The reason we didn't give it before, was because there was a break in the testimony when the doctor went on the stand. (Hands document to Mr. Kierr).

BY MR. KIERR:

Q I show you what purports to be a certified copy of the U. S. Coast Guard certificate concerning one Manuel Gonzales, and I ask you to examine it and tell me whether or not it was noted thereon that he served aboard your MASON LYKES for the voyage ending December 19, 1949?

A That is correct.

Q That is the voyage in this Boudoin case?

A Yes, that is the one.

Q Would you tell me whether or not he served on any other vessels operated by your company, and give me the names and dates thereof?

MR. WRIGHT:

Since December, 1949.

A 5/30/51 to 8/6/51, Hattiesburg Victory --

BY MR. KIERR:

Q Did your company operate that vessel?

A Also 8/7/51 to 9/21/51, Hattiesburg Victory. Stella Lykes, from 11/30/51 to 3/4/52. Cape Friendship from 3/20/52 to 3/25/52. Dwight L. Moody from 3/28/52 to 5/21/52. John Lykes from 10/8/52 to 1/2/53. Those vessels are all operated by Lykes Brothers, I believe operated at that time.

Q Did Lykes Brothers seek to refuse employment on those vessels to Mr. Gonzales?

A No, sir.

Q Has Mr. Gonzales been listed in your company as one of the socalled open performers?

A No, he hasn't.

Q What does performer mean in it's use by your company?

A It is a little involved there. It would be sometimes drinking; sometimes go on the other side on articles and doesn't come back, stays away from the vessel.

Q How about a man who would attack another man aboard the ship and injure him with a bottle?

A In a personal disagreement, I wouldn't know -- if two men on board the ship, or two men ashore, got in a fight, I don't think they would be called performers.

Q You mean if one seriously hurt the other with a glass bottle you wouldn't consider he was a performer?

A If his record at the time was all right, I wouldn't classify him as a performer, no, particularly where two men had personal differences between themselves.

Q Would you consider him a safe man to employ aboard the vessel?

A If there was no complaint about him.

Q How many opportunities do you give a man before you decide he is a confirmed performer?

A That is hard to tell.

Q Do you not ban members from your vessels after their first demonstration?

A Not in all cases. If we did we wouldn't have many men aboard vessels, every time they would have a little fist fight.

Q Do you know that Manuel Gonzales was alleged to have struck Elie Boudoin on the head with a bottle of whiskey, causing serious injury, including a cut in the back of the head, requiring some fourteen to eighteen stiches?

A You ask do I know that?

Q Did your investigation disclose that to you?

A As I said before, I made no personal investigation of this matter.

Q If I told you those were the facts, would that come to you as news today?

A No. The fact is he did have an argument with Mr. Gonzales on board the vessel. There was an altercation between the two men, in which he said he had been struck on the head with a bottle.

Q You know this incident occurred in Mr. Boudoin's forecastle?

A I would have to look up the record on that.

Q Would it come to you as a surprise if I told you Mr. Gonzales entered Mr. Boudoin's room while Mr. Boudoin was asleep, and it was there the assault took place, in Mr. Boudoin's bed room?

THE COURT:

Let's go on to something else. That is not pertinent.

BY MR. KIERR:

Q On the basis which I have outlined to you, would you tell me whether or not in your company Mr. Gonzales is an acceptable man for employment on your vessels?

A His past record, and his record since this incident proves he is all right, had no trouble with him before or afterwards.

Q How do you know that?

A Because if he had any trouble after that time, they would have gotten a report from the vessel from the master.

Q Have you at any time listed Mr. Boudoin on any of your undesirable or unacceptable company list?

A I have not.

Q Doesn't your company maintain a card file system covering it's crew members?

MR. WRIGHT:

I think this aspect was discussed and ruled out of the subpoena.

THE COURT:

It is pertienent to this inquiry.

A What was your question, Mr. Kierr?

BY MR. KIERR:

Q Doesn't your company maintain a filing card system wherein is recorded all reported instances of misconduct, Coast Guard files?

A The Marine Department doesn't keep cards like that.

Q Under whose jurisdiction would that be?

A Under Insurance and Claims, if we had such a file. The only cards the Marine Department keeps is for officers.

Q So that is not under your jurisdiction?

A It is not.

Q Is there a representative in Court today?

A Yes.

Q To whom do you refer?

A Mr. Beyer.

Q He has been sitting in the Court room during your testimony?

A Yes.

Q The testimony you have given doesn't include examining any card filing system which he may maintain?

A No. I haven't any card filing system in connection with this particular case.

OFFER: MR. KIERR:

In connection with the witness's testimony, I offer, introduce and file in evidence the said Coast Guard record, identifying it as Libelant-9.

I tender the witness.

MR. WRIGHT:

I think we made the same introduction of the Coast Guard record in the plaintiff's case, and I ask that it be marked for identification Defendant exhibit No. 16. If Your Honor please, both of these certificates, one which I am introducing on Elie Boudoin, and the one which I produced for Mr. Kierr to comply with his subpoena duces tecum, are dated

February 6, 1953, and have been certified by the Treasury Department of the United States Government in accordance with the provisions of the U. S. Code Annotated, and under such provision I believe can be introduced in evidence without identification.

MR. KIERR:

I have no objection.

THE COURT:

Mark them properly.

MR. KIERR:

In fact, I join in the tender and mark Mr. Boudoin's record Plaintiff -10.

Q In connection therewith, I would like to ask the witness whether or not his company operated the Dolly Turman on which Mr. Boudoin was employed?

A Yes, sir.

Q And would you tell me any other Lykes vessels upon which he has been employed?

A Cape Lilibeo, 4/3/47 to 4/7/47. Jean Lykes, 3/22/48 to 4/4/48. Dolly Turman and Mason Lykes.

Q Do you have any records concerning any logging or fines imposed upon Mr. Boudoin while in the employ of your company?

A No. I have no records of that kind.

Q Have you any records of any disciplinary action taken with regard to him?

A I have no records of that kind in my office.

MR. KIERR:

That is all.

REDIRECT EXAMINATION:

BY MR. WRIGHT:

Q Referring, Captain Biggers, to the certificate from the U. S. Coast Guard on the service record of Elie J. Boudoin, would you look at his service record and tell me from the period of time involved that he served on various ships, if you can determine whether or not he ever served any extended period of time on Lykes ships prior to the MASON LYKES? By extended period of time I mean from two to four or five months?

A On the Dolly Turman he served on there for about thirty-three days, as shown on there.

Q Is that the longest period of time, other than the MASON LYKES?

A Yes, sir.

Q All the others range about what length of time?

A About two or three days.

MR. KIERR:

I think it is argumentative, and the record speaks for itself.

THE COURT:

The record speaks for itself.

MR. WRIGHT:

Your Honor, I realize the record speaks for itself, but there are some things I would like to bring out by the

record itself.

THE COURT:

All right.

BY MR. WRIGHT:

Q Suppose you scrutinize the record very carefully in so far as the period of time that Boudoin served on ships prior to the MASON LYKES, and see if you can locate any vessel that he served on more than, I will say thirty days?

A (Witness referring to document).

OBJECTION: MR. KIERR:

I object to the question for the same reasons.

THE COURT:

I overrule the objection.

A The Dolly Turman is the only one.

OFFER: MR. WRIGHT:

We would like to join in the offer of the service record of Mr. Gonzales, and have it marked for identification Defendant exhibit No. 17.

RECROSS EXAMINATION:

BY MR. KIERR:

Q Captain, who is responsible for maintaining decorum aboard your vessels when at sea?

A The captain.

Q And he delegates the authority to the officers on watch?

A No, sir, he doesn't delegate the authority either afloat or ashore.

Q Well, for example--

OBJECTION: MR. WRIGHT:

I object to this line of questioning on the ground it is beyond the scope of the direct examination and beyond the scope of anything the witness has testified to up until now.

THE COURT:

What is the purpose of the question?

MR. KIERR:

I want to inquire into what policy this company maintained regarding the drinking activities of parties, so-called, on board their vessels.

THE COURT:

That was developed yesterday through Captain Jimison. I sustain the objection. We will recess until tomorrow morning at ten o'clock.

Court adjourned until ten o'clock, March 21, 1953.

o-o-o-o-o-o

MARCH 21, 1953: 10:00 AM:

MR. WRIGHT:

If Your Honor please, we have no other witnesses for the defense.

THE COURT:

Where is Gonzales?

HUGH FLATTERY: Witness, being duly sworn on behalf of defendant, was examined and testified as follows:

BY THE COURT:

Q Mr. Flattery, will you state for the record what your

position is?

A Business representative, National Maritime Union.

Q Do you know this Gonzales who has been talked about in this case while you have been sitting in here?

A No, I don't.

Q Do you know where he is now?

A No, sir.

Q When was the last time he sailed?

A I would have to check the record. I understand in January, 1953.

Q In other words, within the last sixty days?

A Yes, sir, about.

Q You say he sailed, or he came back at that time?

A He came back. He was on the John Lykes.

Q Do you know whether or not he has sailed since January?

A He has not sailed since January from New Orleans. He may have sailed from some other port.

Q Has your Union any information on him whatever as to where he sailed from?

A No, sir, not from any point except New Orleans.

Q How difficult would it be to get the information as to whether or not he has sailed from another point?

A We would have to go back in our records from the time he terminated his employment in January, and check from our National headquarters as to what port he shipped from.

Q Does the Coast Guard keep such records?

A Yes, sir.

Q Keep them in such way this information can be obtained?

A Not immediately, no.

Q Your records pick the man up after he comes back here?

A After he comes back, that's correct.

Q Have you any information on this man whatever as to his whereabouts?

A No, sir, I don't.

THE COURT:

You want to ask any questions?

MR. WRIGHT:

No, sir. If I might be able to make a statement which would be considered off the record.

I have tried to get Gonzales. The address which Lykes had for him was not the address appearing on their articles. The home town address is somewhere in Mississippi. I directed letters, telegrams, and finally a phone call to that address. I spoke to the party who answered the phone and said he had not returned home in some six or eight m months.

THE COURT:

What address was that?

MR. WRIGHT:

An address in Mississippi. The address appearing on the articles on the last ship he sailed on for Lykes was the Mississippi address. I wrote letters and sent telegrams and got no answer, so finally I picked up the phone and called him and located someone living there. I don't know that party, but I think his sister who said he wasn't

there and hadn't been there for six or eight months, sometime last summer, and when I received the information he had been on Lykes ships -- I would have to check my file -- I learned that after the ship got back -- the Coast Guard records are so far behind that you can't learn what ship he is on until the ship gets back. Sometimes, if you happen to catch it right on a long voyage, you can get the information before he gets back and contact him when he returns.

Aside from checking Mr. Flattery's record, we were continually wiring to the Coast Guard over a period of weeks, thinking there would be some chance of finding out what ship he was on before he came back.

THE COURT:

Does Counsel wish to make any statement about Gonzales. Have you made any effort to locate him?

MR. KIERR:

Yes, we did. We checked the police record which pertains to the arrest which occurred during March of 1950 and from that got the names of the witnesses, including the addresses-

THE COURT:

I am interested in knowing what effort you made to locate Gonzales.

MR. KIERR:

We located his address in New Orleans, which was 936 Esplanade Avenue, and ascertained that was a rooming house operated by a Victor Lamoureux. I contacted Mr. Lamoureux

at that address and he informed me that he hadn't heard from Mr. Gonzales since the incident, the one that took place in 1950. He said he was under the impression Mr. Gonzales was on a ship that broke in two at sea, and that he was lost at sea. It occurred to me that the gentleman thought I was trying to gather some information with regard to the criminal prosecution, and I tried to make it clear to him that it had nothing to do with the criminal prosecution. Another person listed at that address, who is an upholsterer in the furniture business, told Mr. Lamoureux I could locate him at an upholstery place on Royal Street, but he didn't have the address, and I personally went to this place, which incidentally had no name on it, but as I recall is in the eight or nine hundred block on Royal Street on the river side, and I was told by the operator of Hurwitz Furniture Company, or one of similar name, that he was not there and couldn't direct me to him. Other than that, I have had no way of locating Mr. Gonzales. I have never been successful in locating him.

THE COURT:

All right. Are you finished with Mr. Flattery?

MR. WRIGHT:

Yes, sir.

THE COURT:

Have you some depositions?

MR. WRIGHT:

Yes, sir. I have some depositions and offers to make.

I think it might be a good idea to make the offers and hold the depositions to the last.

In connection with the previous discussions, we have procured photostatic copy, in accordance with the agreement previously made, of the shipping articles for the particular voyage involved. In other words, this is a photostatic copy of the shipping articles for the voyage. We would like to offer, introduce and file it in evidence, marked as Defendant exhibit No. 18. Is there any objection?

THE COURT:

I think that was produced at the request of Counsel for plaintiff, wasn't it, the articles in question? Let's proceed to something else.

MR. WRIGHT:

We agreed to get photostat copies of the records from Charity Hospital and Touro, and I would like to offer these photostat copies in lieu of the original records, so the original records can be returned to the respective hospitals.

THE COURT:

All right. You assumed the responsibility of their return.

MR. WRIGHT:

Yes, sir, I believe I did, so with the Court's permission I would like to get the originals of Touro and Charity Hospital records, and substitute these two photostats.

THE COURT:

What about the Marine Hospital?

MR. WRIGHT:

The Marine Hospital record was produced by Mr. Kierr.

THE COURT:

The Court will release the original records to Mr. Wright and get a receipt for them.

MR. WRIGHT:

With reference to the record of the Union which was produced and which we agreed was an authentic Union record, I understand Your Honor would like to make some type of ruling.

THE COURT:

My ruling is it is excluded.

MR. WRIGHT:

In view of Your Honor's ruling to exclude it, I would like to make the offer and submit the record in evidence marked "Excluded", in accordance with Your Honor's ruling.

THE COURT:

Yes. It becomes part of the record, but marked "Excluded".

OFFER: MR. WRIGHT:

In connection with the testimony of Dr. Karr, we offer, introduce and file in evidence the reports of Dr. Karr which he referred to during his testimony, the original one of 1950, being marked Defendant exhibit No. 19, and the second report of 1953, being marked Defendant exhibit No. 20.

MR. KIERR:

May I make this observation to the Court. I offered

and introduced Dr. Garcia Oller under these circumstances. I gave a copy of that report to Counsel for Respondent prior to the trial, I believe a day or two before, and permitted them to read it several days before that. Also Respondent's Counsel asked several questions of the doctor from that report, which is in their possession, and I thought it was in order to tender that report in evidence, realizing that if they had any objection they would have made it.

In so far as Dr. Karr's reports are concerned, he has testified at quite some length. I didn't have those reports prior to Dr. Karr's cross examination. I didn't examine him from those reports; I didn't refer to them, and it occurs to me that is a different situation than the other. The reason I didn't make a simple objection to the tender of Dr. Karr's reports, was because I didn't want to appear unsportsmanlike about it. I make the objection because they are selfserving documents, and as I view it, there is no proper foundation to justify their introduction, and I leave the matter to the Court's decision.

THE COURT:

The rule is they are inadmissible when introduced by the other side. Dr. Garcia Oller's report was introduced by stipulation.

MR. WRIGHT:

That is right.

THE COURT:

If Mr. Kierr doesn't agree to the introduction of Dr.

Karr's reports, they will be excluded.

MR. WRIGHT:

I might mention for the record, the material parts of the reports were discussed in the pretrial conference.

OFFER: MR. WRIGHT:

I would like to offer, introduce and file in evidence the Marine Hospital record, and ask that be identified as Defendant exhibit No. 21.

The log book was referred to by the plaintiff, and I think it would be a good idea if we offer, introduce and file it in evidence, such log to be marked for identification Defendant exhibit No. 22.

MR. KIERR:

May I join in that offer.

THE COURT:

Suppose you identify the log book.

MR. WRIGHT:

I believe the one we are talking about has been left with the Court, which is the deck log book. I guess the plaintiff referred to it as the bridge log book, of the S/S MASON LYKES, which are two books, book Nos. 3 and 4 of Voyage 8, covering the period of time from November 27, 1949 to December 27,1949 with reference to book No. 4, and covering the period from October 27, 1949 to November 26, 1949, with reference to book No. 3.

Mr. Kierr and I have agreed we would enter into a stipulation that Manuel Gonzales is still in good standing with

the National Maritime Union.

THE COURT:

Let the record so show.

MR. KIERR:

I don't recall the exact words of Mr. Wright concerning that stipulation, but it is my recollection he asked if I would stipulate that Mr. Gonzales is still shipping through the hiring hall, and in view of his sailing record, there is no doubt about it. As far as being in good standing, and what that term means, I suggest that doesn't become a material part of the stipulation.

THE COURT:

Are you willing to stipulate Gonzales is still sailing through the Union hall?

MR. WRIGHT:

Could we ask Mr. Flattery whether or not he is in good standing?

THE COURT:

Call Mr. Flattery to the stand.

MR. HUGH FLATTERY: RECALLED:

BY MR. WRIGHT:

Q Mr. Flattery, do you know whether or not any disciplinary action has been taken against Manuel Gonzales by your Union?

A Not to my knowledge.

Q Do you know whether he is considered to be in good standing in the Union?

A I will have to check our records to see if he is in good

standing as of today.

Q Withih the past few days have you discussed Gonzales' standing in the Union with anyone?

A No.

Q Has anyone requested you to check your records to determine whether or not he is in good standing?

A No.

BY THE COURT:

Q Was he in good standing as of the time he got off the MASON LYKES?

A I assume he was. He was shipping out at that time and in good standing.

BY MR. WRIGHT:

Q The other day when I spoke to you on the phone, did I ask you to check your records?

A You asked me if any charge of disciplinary action had been taken, and I said our records did not reflect that, that any disciplinary action had been taken against him.

Q Since January?

A Since January.

BY MR. KIRR:

Q Mr. Flattery, when you were first on the stand you said someone had inquired of you concerning Mr. Gonzales' shipping record. Who was that communicated with you?

A Mr. Jimison.

Q Of Lykes Brothers?

A Of Lykes Brothers.

MR. KIERR:

That is all.

MR. WRIGHT:

The injury report involving this matter was produced under subpoena served by the plaintiff. I don't think I have a right to introduce it.

THE COURT:

I think you have a right to introduce it. If you want to offer it, it will be accepted now, if you assume that it is authentic.

MR. WRIGHT:

That is one of the problems.

THE COURT:

If there is no stipulation as to it authenticity, that is another problem, but as far as being admissible, it is admissible.

OFFER: MR. WRIGHT:

In connection with the testimony yesterday of Mr. Biggers, we would like to offer, introduce and file in evidence the two letters the witness referred to, one letter being dated October 5, 1949 from the National Maritime Union of America to Lykes, and ask that it be marked for identification Defendant exhibit No. 23, and the second letter from Lykes to Mr. McDougall of the National, dated October 21, 1949, and ask that it be marked Defendant exhibit No. 24.

If Your Honor please, I would like to substitute a photostat copy for the letter written by the National Maritime

Union, since that is an original document.

THE COURT:

All right.

MR. WRIGHT:

If Your Honor please, for the Court's convenience I have compiled four or five memorandum sheets of paper showing the rather lengthy service record, from the Coast Guard, of the plaintiff, listing the number of vessels he served on, the length of time he served in each, in terms of months and days. I was wondering if Your Honor would like me to introduce it, merely for the Court's convenience in compiling the period of time he served on each vessel.

THE COURT:

Submit the memorandum.

MR. WRIGHT:

In the depositions of Captain Townsend and the chief officer Staggers, there are some parts of the depositions I think objectionable.

THE COURT:

Cross examination?

MR. WRIGHT:

Yes, sir.

THE COURT:

Let's proceed and get to the parts to which objection will be made.

MR. WRIGHT:

With reference to the deposition of Captain Townsend,

on page twenty at the bottom of the page, where he said that Gonzales admitted his responsibility. I object to the form of the question and the use of the word "responsibility", since it was not in terms of something definite of what he said or didn't say. I would like to urge that objection.

THE COURT:

I overrule the objection. We don't have a jury here. The answer is fairly clear. The statement of the captain was outlined rather fully to which no objection was made.

MR. WRIGHT:

It is rather difficult to pick out all the parts of this cross examination without taking a great deal of time. I would rather save time and make a general objection to all the testimony on cross examination, and go on through to page seventy. It is pretty hard for me to pick out isolated parts.

My objection is this. There was a great deal of information elicited from the witness, which was not within the personal knowledge of the witness. It was based upon things that other men told him, things that he didn't see himself but learned from talking to other men on the ship; other statements that had been made, and my objection was directed to all those things brought out in the deposition, outside of the personal knowledge of the witness, and it is sort of interwoven throughout the cross examination.

THE COURT:

Mr. Kierr, what is your position with reference to the

testimony of the captain concerning the incident?

MR. KIERR:

The ship's master is in the position of respondent when an incident occurs aboard the vessel while in foreign ports. He is the one to investigate the matter and act on behalf of the respondent. He is required by law to do all those things. As Mr. Biggers said on the stand yesterday, the master cannot relieve himself of responsibility. I take it that includes proper policing of the vessel, inspection of the quarters, discipline of the crew, etc., and no doubt this ship master discharged his duty as he saw it subsequent to the assault, in that he took complete statements from parties of interest, he didn't gild the lilly in what was seen, made a full and complete disclosure thereof to the steamship company and the U. S. Coast Guard, and I submit all the questions we asked the ship's master were pertinent. Some of them may have been repetitious, but that is natural in taking testimony in advance of the trial.

THE COURT:

My disposition with reference to this case is to be as liberal as possible in admitting evidence so the Court may consider the case in all its aspects.

It is concerned with the question of knowledge, the question of the policy of the company, the question of what the Union's policy is. I want to get the whole picture of what the policy of the Union is, the policy of the steamship company, and how the steamship company and the Union

work together. I think we should have the entire picture, so the Court of Appeals can take from the entire picture the parts that are relevant, and eliminate from the picture the parts that are irrelevant.

It is also important to know whether or not the policy of the company subsequent to this incident is pertinent to the inquiry. If it is pertinent to the inquiry, then the knowledge which the captain gained through his investigation because relevant in connection with the testimony.

I am not making any ruling now, but giving you the benefit of what is going on in my mind in connection with this whole case. I believe it should be presented in it's broadest phase, so the entire evidence will be before the Court of Appeals. As I say, I am not ruling on the issue. I want to study the cross examination. I will take the matter under submission with reference to the objections.

MR. WRIGHT:

In that event, could I make my objection a little more specific with reference to the testimony of Captain Townsend?

THE COURT:

Yes.

MR. WRIGHT:

In so far as the following pages containing information which the captain did not actually see himself, but which he acquired from inquiries of other crew members, or through hearsay, we object. Those pages are pages 20, 21, 22, 23,

with reference to the official log book, that is to say, we object to the information contained therein, in handwriting, which is hearsay, and based upon things the witness did not actually see, the witness being the captain who wrote the log.

In addition, we object to all the statements which are attached to the official log, except for those two statements which were used by the captain and chief officer to refresh their recollections.

THE COURT:

The Court has already ruled on that also. Let's make it crystal clear. The log is admitted in evidence. The statements, except the two statements, are excluded.

OFFER: MR. KIERR:

Your Honor, I would like to offer, introduce and file in evidence what purports to be a photostat copy of the Shipping Articles pertaining to the voyage in question, and observe at this time that the commentary therein which might apply to intoxication, is contained about one-third of the way down from the top of the first page, reads as follows: "Going on shore in foreign ports is prohibited except by permission of the master." That is in large type, and in smaller letters: "No dangerous weapons or grog allowed, and none to be brought on board by the crew." We identify that as --

MR. WRIGHT:

It has already been identified as Defendant-18.

VOLUME I I

TRANSCRIPT OF RECORD

Office - Supreme Court, U.S.
FILED
JUN 28 1954
HAROLD B. WILLEY, Clerk

UNITED STATES
COURT OF APPEALS
FIFTH CIRCUIT

...oOo...

NO. 406

...oOo...

LYKES BROS. STEAMSHIP CO. INC.

Appellant - Appellee

versus

ELIE J. BOUDOIN

Appellee - Appellant

(and reverse title)

...oOo...

Appeal from the United States District Court
for the Eastern District of Louisiana

(ORIGINAL RECORD RECEIVED:)

24, 25, 26, 27, 28 and then jumping to page 40 through 64.

THE COURT:

All right.

OFFER: MR. WRIGHT:

We offer, introduce and file in evidence the original deposition of Captain Townsend, marking it for identification Defendant exhibit No. 25.

THE COURT:

I note there are statements attached to the deposition. I think those statements are already in evidence.

MR. WRIGHT:

No, Your Honor. We urge an objection to any statements, other than the statement which the captain himself gave, and which he testified he used to refresh his recollection. All the other statements are objected to by the defendant. Actually, they are photostat copies attached to this deposition. These are the same statements which were attached to the official log, photostat copies of them. We make the same objection with reference to these statements as we did to the official log, other than the one used by the witness to refresh his recollection.

MR. KIERR:

The master's statement has already been introduced in evidence.

THE COURT:

No objection to the master's statement.

MR. KIERR:

With regard to the others, I want to, in due time, or now re-offer all of the documents attached to the twenty odd pages of the official log book, page 22 or 23, I believe it is, because I believe when Your Honor reviews the deposition and looks at the prospectus of the case, you will find that all of them ought to be admitted in evidence, and in that connection I would like to tender as exhibits in this case, all of those identified by the complainant in the deposition.

THE COURT:

The statements which are not statements of the captain will be marked "Excluded". The captain's will be identified in evidence.

MR. WRIGHT:

Going to the deposition of Chief officer Staggers, we might take up, if Your Honor please, statements also to this deposition. I would like to object to all of the statements, other than the statement of the witness, Chief Officer Staggers. We object to the picture of Manuel Gonzales, which is attached to, or right next to a press release.

THE COURT:

The picture has already been admitted in evidence. The press release has been excluded. The statement of the chief mate is excluded, and the statements of others attached to the depositions are excluded.

MR. WRIGHT:

The objections which we have with reference to the cross examination of Chief Officer Staggers, are all centered around the same objection that is made with reference to the captain's deposition, that is to say, the cross examination contains a great deal of hearsay information, and information the chief officer obtained from other people, and he did not personally witness such information contained on pages 12,13, 14, 21, 22, 23, 28, 29, 30, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48 and 62. With those objections, we offer, introduce and file the deposition of Chief Officer Staggers into evidence, and ask that it be marked for identification Defendant exhibit No. 26.

I don't know whether I actually made an offer of the Touro and Charity Hospital records, but merely as a precautionary measure, I would like to check to see whether I made a tender of the Touro and Charity Hospital records.

OFFER: MR. WRIGHT:

I would like to offer, introduce and file into evidence the medical record of Elie Boudoin from the Charity Hospital and from the Touro Infirmary in New Orleans,which were produced as a result of our subpoena, and ask that the Charity Hospital record be marked Defendant exhibit No. 27, and the Touro record be marked for identification Defendant exhibit No. 28.

With that, Your Honor, we rest our case.

THE COURT:

Does plaintiff rest?

MR. KIERR:

Not quite, Your Honor.

I would like to join in the offer of the exchange of correspondence between Lykes and the Union, and identified as Defendant-23 and Defendant-24. I would suggest, in order to save time, that we stipulate that there is a notation on the Union letter, which is dated October seventh, addressed to Captain Biggers, stating: "This looks o.k. to me. Good procedure for a trial at least," and signed with the initials that appear to be those of Mr. Jimison.

MR. WRIGHT:

Mr. Biggers informs me this is a notation made by Mr. Jimison to Captain Biggers.

OFFER: MR. KIERR:

We would like to offer in evidence all of the statements attached to the depositions, particularly those which were used by those witnesses for the purpose of refreshing their respective memories.

THE COURT:

The Court has already ruled on those.

OFFER: MR. KIERR:

I intended to offer the official log book in evidence, together with it's pertinent page-22 and the attachments. However, I note that it doesn't bear an identification number, so at this time I will again offer it and mark it Plaintiff U. S. Coast Guard.

OBJECTION: MR. WRIGHT:

Your Honor, we reiterate our former objection

MR. KIERR:

We join in the tender and will use the same designation.

We offer, introduce and file in evidence the complete record of the U. S. Marine Hospital, identifying it as Plaintiff-11.

THE COURT:

Is that the record it is your responsibility to return?

MR. KIERR:

Yes. I suggest photostat copy thereof be annexed thereto. When I say it is my responsibility, I may say it was produced here in response to my subpoena. The one I believe the Court bound me to be responsible for, was the one from the Louisiana Department of Public Welfare, and I ask Mr. Shaw to make a photostat of it at my expense. I don't know what responsibility I assumed.

THE COURT:

Did you make any agreement with the lady from the Marine Hospital?

MR. KIERR:

I don't recall one.

MR. WRIGHT:

I don't recall any, but I do know as a general rule, Your Honor, we are responsible for their return.

THE COURT:

You work it out with the Marine Hospital. There is no point in cluttering up the record with the original.

Street, Moss Point, Mississippi, one of which is dated November 11, 1952, also on the John Lykes, and another one apparently dated September 13, 1948 on your Richard Upjohn. Have you had occasion to interview him in connection with those matters, also Letitia Lykes?

A 1948. That is designated as an infectious disease; no reason for the company to interview him.

Q Did you get an illness report on that?

A Yes.

Q What did it show?

THE COURT:

What is the relevancy of that?

MR. KIERR:

It occurs to me that the infectious disease indicated from 1948 through 1952 would have some bearing on the man's vicious propensities. (Hands card to Court).

OBJECTION: MR. WRIGHT:

I object to the question. This is nothing but a fishing expedition.

THE COURT:

I overrule the objection.

Q What is that, syphilis?

A It indicates to me gonorrhea.

Q Any connection between 1948 and 1952?

A November, 1952, probable infectious disease. That to me indicates suspicion of gonorrhea condition, but no proof of it, no Wassermann positive.

MR. KIERR:

It is a relatively short record.

THE COURT:

Suppose you have it photostated, and see that the original is returned.

MR. KIERR:

I take it the respondent has no objection to substituting a photostat copy of the Marine Hospital record.

MR. WRIGHT:

None whatsoever.

MR. KIERR:

Your Honor, Mr. Beyer is in the Court. I would like to interrogate him momentarily with regard to the subpoena duces tecum which was served yesterday upon respondent for certain card indexes.

MR. MARTINEZ:

You say subpoena duces tecum. I want to get clear on that. Mr. Beyer merely received a personal subpoena, and he is down here with a personal subpoena to take the stand at the request of Mr. Kierr. I tendered the other witness yesterday in connection with the subpoena duces tecum. I merely draw that to the Court's attention, and not raising any point.

THE COURT:

All right. Let's proceed. Call Mr. Beyer.

Q If that had been syphilis, would it have been listed in the same way?

A No, sir. It would be indicated as syphilis. It is indicated here in 1948 as infectious disease.

BY MR. KIERR:

Q What was that?

A Gonorrhea.

Q Have you had occasion to check your file to see what kind of disease it was?

A Only the John Lykes yesterday. I reviewed the two cases.

MR. WRIGHT:

These cards are index cards made out by someone in the Lykes organization, typed up by someone in the office force. The type of information contained in them is pretty much the same type of information contained in the Union file with reference to the charge which was brought against the plaintiff by the Union, which they want excluded.

THE COURT:

I don't know if you understand, but the contention is this. If this man had syphilis, it might affect his mind, and it would be helpful to get the records themselves.

Q There is no indication from those cards at all that this infectious disease was syphilis?

A No, sir.

THE COURT:

All right. Let's proceed.

I N D E X

VOLUME NO. II

	PAGE NO.
Harry M. Beyer	246
Deposition of Capt. George P. Townsend	268
Deposition of Clarke Staggers.	331
Deposition of Manuel Gonzales.	387
Supplemental and amended complaint and Order.	478
Opinion of the Court.	479
Judgment.	487
Motion and Order to extend the staying of Judgment without posting security.	488
Motion to obtain order directing plaintiff to elect	489
Motion to alter and/or amend judgment, etc.	490
Hearing on motion of defendant to alter and/or amend judgment and order denying same	491
Notice of Appeal.	492
Motion for stay of execution without the necessity for fixing a Supersedeas Bond	492
Designation of Contents of record on appeal	493
Designation of portions of reporters transcript, etc..	494
Appellee's designation of contents of record on appeal.	495
Motion and order to transmit documents in the original to the Court of Appeals	496
Notice of Appeal to the U. S. Court of Appeals. . . .	497
Designation of Contents of record on Appeal	497
Notice of Statement of Points relied on	498
Designation of points to be relied upon by appellant, Lykes Bros., etc..	498
Clerk's certificate	500

HARRY M. BEYER: Witness, being duly sworn on behalf of plaintiff, was examined and testified as follows:

DIRECT EXAMINATION:

BY MR. KIERR:

Q Please state your name?

A Harry M. Beyer.

Q What is your position with Lykes Bros.Steamship Company?

A I am assistant to the manager of the insurance and claims division.

Q Who is manager?

A George Hill.

Q Are you the one actively in charge of that department?

A George Hill is actively in charge. I am actively in charge of handling the personal injury and illness cases.

Q Were you active on behalf of your employer in the handling and preparation of it's defense in this case?

A Yes.

Q Did you spend any time with Counsel in connection therewith?

A Only since about two days ago.

Q You were at their office two days ago?

A Yes.

Q Was Mr. Hill there?

A No.

Q Were you present yesterday when Mr. Biggers testified?

A Yes.

Q It is my recollection that he said that a type of index

was kept by his company concerning men who were performers, and who made claims for illness and injury, or were guilty of misconduct, and that such a file or index was maintained by the personal injury and insurance section of the company?

A That's right.

Q Do you have such an index?

A Yes. We have a card index system on all illnesses or injuries, and all other matters that come to us in connection with the inspection of claims that might be made.

Q You have one pertaining to Mr. Boudoin?

A A card?

Q Yes.

A Yes, we have a card on this case.

MR. KIERR:

May it please Your Honor, I ask for the production of such a card.

BY THE COURT:

Q What is the purpose of it? Are you interested in whether or not a man is belligerent?

A Any claims and any information that comes to us with that file, I inspect all claims that are injected in the file.

Q In this file you would put any information that would be helpful in connection with any claim which might be made against the company?

A That is right.

THE COURT:

You can ask the question.

BY MR. KIERR:

Q Would that include misconduct on the part of your crew members?

A If the data came to us, and we made a card on it, we would index it.

Q What about crew members that were logged for intoxication or disobedience of orders?

A Not unless it came to us in some shape or form. We don't check the official log book. The seamen aboard ship enters it in the log book. Very likely we would have no record of that.

Q It would come to your attention if the master sent in a written report?

A Yes.

Q Does your card index, or filing system, contain any entries regarding misconduct on the part of Elie Boudoin?

A No.

Q How about loggings for intoxication?

A On Boudoin?

Q Yes.

A No, nothing has come to us.

Q How about misconduct of any type?

A On his part?

Q Yes.

A No, nothing.

Q How about missing watches?

A No.

Q Could you give me the same information concerning a man named Manuel Gonzales?

A You mean would I have that information?

Q Do you have that information? Do you have any cards at all on a man named Manuel Gonzales?

A Yes.

Q Do they pertain to illness only?

A Illness and injury, yes.

Q Do you have any record pertaining to any act of misconduct on his part?

A We do not.

Q How about intoxication on his part?

A No.

Q How about missing watches?

A No.

Q How about fines or loggings because of his conduct on the vessel?

A No.

Q How about going ashore without permission?

A No.

Q May I see the card pertaining to illness and injury?

MR. MARTINEZ:

I would like to limit that to the two men, any cards he may have on Gonzales and Boudoin.

THE COURT:

It will be so limited.

A (Witness hands cards to Mr. Kierr).

BY MR. KIERR:

Q I note that a more recent card on Mr. Gonzales contains reference to an injury sustained by him on December 23, 1952 on your S/S John Lykes?

A That is right.

Q Have you had occasion to interview Mr. Gonzales in connection therewith?

A That was an elbow injury?

Q Yes.

A That was a minor condition that he sustained. The ship was at anchor and he was taking down the anchor ball and he stepped off the deck on the valve, and the valve turned with his weight, and he slipped and fell. Nothing else came from the injury; no need to interview him.

Q I take it from your testimony that no representative of your company did in fact interview him?

A Well, the ship master made a report on him. This was made up from his report. (Indicating).

Q Did your company interview witnesses in connection with that accident?

A No. It was only his report.

Q How about your Underwriting representative?

OBJECTION: MR. WRIGHT:

I object, as irrelevant and immaterial.

BY MR. KIERR:

Q I note further there are two other cards concerning this man Gonzales, all showing the same address, 1208 Elder

BY MR. KIERR:

Q The only entry your report contains regarding Elie Boudoin, was a bruised back which he alleges he sustained on the MASON LYKES, October 16, 1949, and cut head November 25, 1949 on the same vessel?

A Yes, sir.

Q He has made no claim with regard to that, has he?

A No.

Q Doesn't your company's practice include the filing of information which would cover an assault by members of your crew? For example, I refer to Lykes letter dated October 21, 1949, addressed to Mr. John B. McDougall, designated as Defendant-24, and I show you the second name listed there, "R. Arendall", which shows this man unacceptable to your company: "While under influence of liquor caused injury to other crew members." And likewise, the one following, "Willie C. Boyd" shows: "Prize performer - caused injury to other crew members when drunk", and I ask you whether or not those are considerations which are taken by your company in declaring a man unacceptable?

A Yes, I would say they are.

Q Has that been done with regard to Manuel Gonzales?

A To my knowledge, no charge has been brought against him by anyone. I don't know of any disciplinary action taken against Gonzales; no record of it.

Q Doesn't your department receive reports concerning unusual incidents aboard its vessels?

A We receive reports of any nature, all kinds.

Q Is one of the questions sought to be elicited in the investigation which your company makes, the question as to whether any person was at fault, if so, who, and in what way, when an injury occurs?

A Yes, we try to.

Q Could you tell me whether or not, in connection with the head injury which Mr. Boudoin sustained in November of 1949, any reply was made to such an inquiry, that is, was it reported to you that any person was at fault, and if so, who, and in what way?

A May I see that? (Hands document to witness). This document you have is the document --

Q Would you mind telling me what the answer to that question is?

A What was the question again?

Q In connection with the assault on Mr. Boudoin by Mr. Gonzales aboard your MASON LYKES in November, 1949, what reply was given to your company to your question: "Was any person at fault? If so, who and in what way?"

A May I read this, because that would be it? This report says that "Manuel Gonzales hit Boudoin about his head with a bottle."

Q These reports are received by your company in the course of the operation of its vessels?

A Yes.

MR. KIERR:

That is all, Your Honor.

CROSS EXAMINATION:

BY MR. WRIGHT:

Q Did you receive any report from the vessel with reference to whether or not the injured party had been drinking intoxicants or using harmful drugs?

A Yes.

Q What was the nature of the report which you received from the vessel as to whether or not the injured party was drinking intoxicants or using harmful drugs?

A The answer to that question is "Yes."

OBJECTION: MR. KIERR:

I object to that question for the reason that it purports to develop a seflserving declaration on behalf of the defendant, because no foundation has been laid in connection with the question.

It is my recollection that the plaintiff stated during his testimony that he had been drinking, and for that reason had gone to bed early that evening before the assault.

THE COURT:

Has it been agreed that this is the accident report?

MR. WRIGHT:

No, Your Honor.

Mr. Kierr had the witness read from one portion of it. The witness read Section-C of Question-12. I now ask the witness to read Section-A of Question-12.

MR. KIERR:

May I correct Counsel. I did not request the witness

to read the answer or anything on that document. He requested permission to do so himself. It is my understanding he assisted in the preparation of this case for trial. He said he reviewed the record, and I assumed he was in position to answer that question from memory.

I accept his statement, but not as an authentic report. As a matter of fact, this is not signed by any member of the Steamship Company, and other considerations about it would involve some doubt, which I think we ought not be forced to go into.

THE COURT:

In view of the fact the witness read one part of that statement, you may read the other part. I overrule the objection. Does the statement show the condition with reference to the sobriety of the injured party?

A "Had injured person been drinking intoxicants or using harmful drugs? A. Yes."

BY MR. WRIGHT:

Q Does the injury report indicate what diagnosis was reported to you with reference to the condition of the injured party?

OBJECTION: MR.KIERR:

I would further object to the last question, as it exceeds the direct examination.

THE COURT:

Where is the adcident report? Can you get the accident report?

MR. WRIGHT:

I was going ahead with that in view of these objections. I think the witness has substantially identified it. Mr. Kierr asked him whether or not it was made in the ordinary course of business, and I will only ask him one or two questions and identify this.

Q Can you tell whether or not this original injury report was made aboard the vessel, and ultimately handed to you?

THE COURT:

I am talking about the injury report, which under the law must be sent in to the Coast Guard. Is there any such injury report?

MR. WRIGHT:

No, Sir. This is a report sent in to the company.

THE COURT:

Is there a requirement of the law that injury reports must be sent in to the Coast Guard?

MR. MARTINEZ:

No, Sir. The only requirement of the Coast Guard is where there has been any serious accident or injury, an entry of which must be made in the official log book of the vessel, but there is no Coast Guard requirement with reference to members aboard ship, only when one complains of a serious accident or injury. Then they turn in a report to the company.

THE COURT:

I will let the witness go on with this, because you started it, but under the circumstances the report is not

admissible in evidence. Answer the question.

A This is the original accident report on file in my office.

BY MR. WRIGHT:

Q What was the purpose of this report being made out aboard the vessel and turned in to you?

A To enable me to build up the file and report to my Underwriters any possible claim that might be made. That is the purpose for which we get these reports.

BY THE COURT:

Q In other words, in connection with any litigation that might result?

A Yes, sir.

BY MR. WRIGHT:

Q Going back to the question I asked you previously, does the report contain any diagnosis of the condition of the injury of Elie Boudoin?

A It does.

Q What is it?

A Cut about head.

Q Can you determine whether or not the front page bears the signature of Elie Boudoin?

A It does bear the signature "E. J." and the last name, which appears to be Boudoin.

MR. WRIGHT:

That is all, Your Honor.

REDIRECT EXAMINATION:

BY MR. KIERR:

Q The signature which purports to be that of a person named Elie Boudoin, isn't that on the page of the report, about which you have been interrogated, Mr. Beyer?

A The signature is on the face.

Q As a matter of fact, the signature is with regard to only one of the questions. That is the one numbered seven. Is that not correct?

A It is possible, unless Mr. Boudoin had read the whole report and agreed otherwise. I don't know.

Q Isn't it obvious, Mr. Beyer, that question number seven says: "Injured's version of how accident occurred and cause thereof," and he signed it?

A Yes.

Q And his signature pertains only to number seven?

A Yes.

Q Can you explain why everything written on this report, including what purports to be the signature of E. J. Boudoin, is apparently written in carbon, whereas, the language under question seven as to injured's version of how the accident occurred, is originally in pencil?

OBJECTION: MR. WRIGHT:

I interpose an objection to that question, because it appears to me that it is not carbon, but a type of pencil which gives the appearance of carbon, but is actually pencil.

THE COURT:

Well, let the witness answer the question. He may have some information on it.

A I don't know. Of course, I wasn't there. Copies are run off. It is quite possible this is an original, or master from which it is made, of a type put on a ditto machine, running off any number of copies you need, so it is immaterial for this report whether it is written in ink, copying pencil or lead pencil, just so it goes through on to the copies. That is my explanation of it. I don't know why, unless Mr. Boudoin wrote it himself. I don't know whose handwriting it is.

bY MR. KIERR:

Q Nothing in this report to indicate Mr. Boudoin was at fault, is there?

OBJECTION: MR. WRIGHT:

I object to that question. The document speaks for itself.

THE COURT:

The document speaks for itself. This witness wasn't there.

MR. KIERR:

I am somewhat hesitant about introducing it in evidence, because it bears no information --

THE COURT:

All right. Let's proceed with this examination.

BY MR. KIERR:

Q Is there anything on that report which shows where the

word "fight" or "altercation" is used?

A May I read it? I can't remember those things.

OBJECTION: MR. WRIGHT:

I make the same objection, that the document speaks for itself.

THE COURT:

Put the report in evidence. Frankly, I was under the wrong impression. If I had known that was not an official document, I wouldn't have allowed any of it, but in view of the fact you have gone into it, I will let it go in.

BY MR.KIERR:

Q You testified with regard to two of the questions under paragraph twelve, the first of which was: "Had injured person been drinking intoxicants or using harmful drugs?" And the answer given there is "Yes." Now the next question under paragraph twelve is what, Sir?

A Designated as "B", reading: "Was he careless?"

Q What answer, if any, was given there?

A It is blank.

Q And the next question: "Was any person at fault? If so, who, and in what way? "You have given that answer?

A Yes, sir.

MR. KIERR:

That is all.

MR. WRIGHT:

The defendant rests.

MR. KIERR:

If Your Honor please, at the outset this morning, Your

Honor inquired what effort I had made to locate Mr. Gonzales, and I was speaking somewhat from memory. I have had an opportunity to go through my file, and I can supplement that statement with some additional information.

THE COURT:

Don't put in a lot of information about assault. I want you to make a statement, but don't put in self-serving statements.

MR.KIERR:

I checked personally at the record room of the New Orleans Police Department and found there were two addresses listed there for Manuel Gonzales-strike that -- two entries, one giving 934 Esplanade Avenue, and the other giving no address. Upon investigating at 934 Esplanade Avenue I contacted Mr. Lamoureux, whom I previously referred to, and Mr. Lamoureux said he worked at Mary's Restaurant, located one block from the Court house here, at the corner of Poydras and Camp Streets, and he was the one insisted he was on a vessel and lost at sea. The address I went to, to seek the upholsterer, I found was the municipal address of 1100 Royal Street.

I was further told that Mr. Gonzales had a sister named Effie, who was married, a Mrs.F. M. Moreland, living on Burgundy Street, and I made an effort to locate her, in order to find her brother, and I couldn't find her.

MR. WRIGHT:

I think other than the Coast Guard records, the Union would be in a better position to run this man down than

anyone else.

THE COURT:

You had Mr. Flattery on the stand. That is the reason I asked Mr. Flattery to take the stand.

MR. WRIGHT:

Did we ever ask him direct whether any attempt was made to locate him through their office at New Orleans?

THE COURT:

He said no. Frankly, I think possibly this case should be kept open until we locate Mr. Gonzales, because it would seem to me it is important in this case. I don't see how this record can be completed until we find Gonzales. In other words, if we are going to make up a complete record on a particular matter, we certainly need all the information we can get, and it is difficult to understand, this man who has been on ships up to within sixty days ago, that now no one can find him all of a sudden. I have never run into a case like this before. It seems to me this man can be found, and it also seems he is a very important part of this case.

MR. WRIGHT:

If we had known of his shipping in January, we could have served him with a subpoena, or discussed it with him. Since that time, Your Honor, I have stated the efforts I made to get him. I spoke to Moss Point. I can't remember the name offhand, but they said he had not reached home since last summer. Obviously he comes in and goes out again without

writing them.

THE COURT:

I assume probably he is on another ship.

MR. WRIGHT:

The information is, he is dead.

THE COURT:

We know he is sailing on ships.

MR. WRIGHT:

Then I would say he is probably on a ship.

THE COURT:

I will give consideration to two things. First, holding the record open. Second, these Doctors contradict one another. Both Doctors admit the Babinski sign cannot be simulated, yet one Doctor says he has it and the other says he doesn't have it.

My understanding of the Babinski sign, is that it is part of the ABCs of neurology and is one of the first things a neurologist learns. Here are two qualified neurologists. One says he has it and the other says he doesn't have it, which is very unsatisfactory.

It is quite difficult, on the basis of the record as it stands, to determine with reference to this man's condition. Of course, I could say I believe one Doctor and not the other, but it would place a very great responsibility on a layman, and is very unsatisfactory, it seems to me, but I will give consideration to both phases of the case.

I am going to hold the record open for some time anyway

and ask both sides to file proposed findings of fact and conclusions of law by May first, and any separate memoranda you want to file.

Now in the meantime, if you get any information about Gonzales, make some effort to get his deposition taken in New Orleans, and complete the record.

With reference to getting another neurosurgeon, I am placed in a difficult position, because seamen proceed in these cases without the benefit of costs, and if the case goes against the seaman I have no way of paying the neurologist, and I would not want to impose upon him to testify and not be paid, so it presents that aspect which is very important from the Court's standpoint.

MR. WRIGHT:

I had one more thing I would like to mention, that is, my theory of the Union record. I would like to briefly mention that.

I believe that his record combined with his service record, which would have to be studied, of course, because we didn't bring it out in detail, not only goes to the question I raised before, the question of liability, but also goes to the issue of quantum of damage, if Your Honor should get to that question. The service record, I think, will show the period of time Boudoin worked on ships two or three years prior to the event on the MASON LYKES, the work he performed on vessels. If you will combine that with the Union record, you will get a picture with reference

to his wages prior to the MASON LYKES, and the question of loss of wages, if that is a question, so I think the Union record plays a part with reference to the loss of wages, and I think taking the Union record, in fact, I think taking the service record alone shows no loss of wages, certainly taking the Union record along with it,you get an explanation of the service record. The service record explains the difficulty which he encountered with the Union.

THE COURT:

The plaintiff on cross examination admitted he had been expelled from the Union, therefore, it would be apparent he could not sail from that particular Union hall, unless they revoked the expulsion, or gave him a Union card, so that is the information you need, as to whether or not he was expelled from the Union.

As far as the cause for his being expelled is concerned, there was indicated excessive drinking might have something to do with the present physical condition of the plaintiff.

The plaintiff admitted on cross examination that one of the charges in the Union Hall was excessive drinking, so you have those two things. I don't need any more than those two things.

With reference to the accident report, in the case of Chapman vs. U. S. the Fifth Circuit refused the admission of the report of the Army Air Force. The same Fifth Circuit refused to let evidence in by way of medical evidence in English vs.U. S. In view of that the Union report is inadmissible, however relevant you might think it is.

MR. WRIGHT:

I appreciate Your Honor's position on that. However, I did feel I wanted to state my position, so my objection would be made in time.

MR. KIERR:

May I enlarge? My previous concern with reference to the Union record that it is further inadmissible, is because it contains nothing concerning the man Gonzales, or Boudoin in so far as the MASON LYKES is concerned, or anything pertaining to the assault, which is the subject of this lawsuit.

THE COURT:

I have ruled it out. The only relevancy I see in the record, would be to show that he could not sail from the particular Union, and possibly the medical, bearing on the question of whether or not the plaintiff's present physical complaints can be related to drinking. Those two things are in evidence.

MR. KIERR:

A final observation I would like to make is this, that the only purpose for which I was trying to find Mr. Gonzales, was to undertake to take his discovery deposition. I don't expect any cooperation from him. I expect him, if he could be made to testify at all,he would be the customary hostile witness.

o-o-o-o-o-o-o-o-o

a right to reject the man?

A Not unless -- as a matter of fact, we don't hire the man, but we can fire him if he is not satisfactory.

Q Now, aside from being a member of this particular union does an individual seaman who reports to your vessel from the union have any papers or credentials with him?

A He has a slip from the union giving his name, book number and so forth, to the head of the department. In other words, we can't hire outsiders. You have to have a man from the union.

Q How many different unions do you deal with?

A The unlicensed personnel, the N. M. U. and the engineers the M. E. B.A.

Q You are talking about licensed engineers?

A Yes, sir.

Q I am talking about unlicensed men like Boudoin and Gonzales.

A All from the N. M. U.

Q Can you state whether or not you had any difficulty with either Boudoin or Gonzales prior to the difficulty that they had on the night of Thanksgiving?

A None at all.

Q Can you describe for us, generally, the two men?

A Well, looking back there, it is three years. Both of them are about the same build. I think Gonzales was dark and Boudoin was light haired. Outside of that they were about the same as far as I know.

Q Did Gonzales possess any particular type trait that you

Testimony of Captain George Prior Townsend

Testimony of Captain George Prior Townsend taken Saturday, December 20, 1952 in the offices of Terriberry, Young, Rault & Carroll, 825 Whitney Building, New Orleans, Louisiana.

o-o-o-o

A P P E A R A N C E S

Raymond H. Kierr, Esq.
New Orleans, Louisiana
Attorney for Plaintiff

Terriberry, Young, Rault & Carroll
William E. Wright, Esq.
New Orleans, Louisiana
Attorneys for Defendant.

o-o-o-o

S T I P U L A T I O N

This testimony is being taken by agreement of counsel, the formalities of signing, sealing, certification are waived, and all objections, except as to form of questions, are reserved to be urged at the time of trial of this cause.

o-o-o-o-o-o-o

CAPTAIN GEORGE PRIOR TOWNSEND: 4901 Travis Drive, Galveston, Texas, called on behalf of the defendant, when after first being duly sworn, testified as follows:

BY MR. WRIGHT:

Q What is your name?

A Townsend.

Q And, what is your occupation?

A Master Mariner.

Q How long have you held that license?

A From 1919 to 1952 is how long? About thirty-three years I guess.

Q And, how long have you been employed by Lykes Brothers Steamship Company?

A A little over thirty years, thirty years and three months.

Q You have been with Lykes almost the entire time that you have been a Master?

A With the exception of my Navy time in the United States Navy I have had two employers in my life, the United States Navy and Lykes Brothers.

Q When were you in the U. S. Navy?

A From 1912 to 1922

Q And you are presently attached -- are you presently attached to any vessel of Lykes Brothers?

A The S. S. Mason Lykes, as Master.

Q Were you attached to the S. S. Mason Lykes in any capacity in November 1949?

A As Master of the Mason Lykes.

Q Do you recall a member of the crew on that particular voyage that was involved in any difficulty in December 1949 by the name of Manuel Gonzales?

A I remember the last name.

Q What was his rating on the ship?

A I think it was deck, probably A. B. or deck maintenance.

Q Do you remember a crew member by the name of Elie Boudoin on that voyage?

A Yes, sir.

Q Do you know what department he was connected with?

A The engine department, probably fireman watertender or

oiler, one of the two.

Q Do you recall anything unusual happening with respect to these two men? That is, at anytime throughout the course of the voyage?

A Yes, sir. On Thanksgiving night, after midnight. Of course, that was the next day. That, I would say was about 2:00 a.m. in the morning. I was called out to a fight aboard the ship to treat a man's head.

Q Who called you?

A I think it may have been the Chief Mate.

Q Suppose you go ahead, Captain, and tell us everything you remember that happened?

A Well, at that time we had a pssenger aboard the ship Dr. Seaman, I believe that was his name, so I had Dr. Seaman called who was kind enough to take care of this man with the cut head.

Q Take care of what man?

A The man Boudoin.

Q Did you go and see Boudoin?

A Oh, yes. I went right down. I put on my bath robe and went down. Boudoin, as I remember was in the fireman's toilet or wash room at the time and he had some blood coming out of his head there and about that time I went to the hospital and then Dr. Seaman came down. I assisted Dr. Seaman in fixing the man up.

Q About how long did Dr. Seaman work on Boudoin?

A Well, as I remember it took quite a little while; until after about 4:00 o'clock in the morning before he was fixed

up and turned into the bunk in the hospital.

Q While the doctor was taking care of Boudoin did you see Gonzales?

A Yes, sir. I saw him several times. I chased him away from the hospital door and so forth.

Q What, if anything, did he do in the vicinity of the hospital door?

A As I remember, he just wanted to give a hand and give blood and so forth and help the other fellow out that he hit.

Q Did he remain at the hospital door?

A Well, off and on until I ran him off a couple of times. I was too interested fixing this man up to be bothered with him.

Q After the doctor completed his treating of Boudoin did you have any dealings with Gonzales?

A Yes, sir. I started to take care of him then. I went up to his room and quited him down.

Q The next morning did you have any further dealings with Gonzales -- the next morning?

A I don't know. The doctor and I took this man to the hospital. I did see Gonzales the next morning and refused him shore liberty, which is my privilege and then the doctor and I took this man to the hospital for X-rays, that is Boudoin. After I told Gonzales that he had no more shore leave, the next thing I knew he was coming back aboard the ship again with a bottle in his hand. Then I put him in irons and threw the bottle overboard the Mate threw it overboard or I did, I don't remember which and then I put him in

irons until he sobered up.

Q Do you recall whether this man Gonzales, in returning to the vessel on that occasion had more than one bottle with him?

A I really wouldn't remember whether he had one or two bottles. I noticed in my statement that I made at the time I said "bottles", but whether it was a typographical error or not I wouldn't know, but whatever he had in his hands went overboard. I met him at the gangway.

Q Now, after that occasion, when Gonzales returned to the vessel, what if anything else transpired between you and Gonzales?

A No, I just put him in irons and locked him up in the storeroom until he sobered up. After that, he turned to again and I had no more trouble with him all the way home.

Q Did you or not at any time call the police to assist you in any way?

A Well, I did call him. They said if they arrested him -- that was at the time of the accident -- not accident, fight. They said unless I would leave him behind for the next court that they couldn't do anything.

Q You are talking about Gonzales?

A Yes, sir. If they had taken him, then of course, I would not have put him in irons myself and worry with him.

Q Can you recall the purpose in calling the police?

A Well, naturally two men were having a fight, when it is reported to you you don't know if you can handle him or not. In other words, I wanted peace from them from then on out.

Q After the ship sailed did you have any further difficulty with either one of these two men?

A No. Boudoin, of course, he was hit on the head and he didn't turn to on the way home. Gonzales, I logged him for money it cost me to have the man replaced.

Q Did you log him for any other reason as far as you can remember?

A Well, I did log him for disobeying orders and going ashore which is in law four days pay for disobeying orders.

Q Can you recall whether you made any log entries of all these things you are telling us about?

A I think I did. I think I made a pretty good log.

Q Did you take statements from these members of the crew?

A Yes, sir, I took statements.

Q Did you give any copies of those statements to the U.S. Coast Guard?

A Yes, sir, upon my return.

Q Well, after the vessel sailed from Africa and on its return voyage to the United States did you have any further difficulty with Gonzales?

OBJECTION BY MR. KIERR:

I object to the leading form of the question.

BY MR. WRIGHT:

Q You may answer the question.

A No, I had no trouble at all.

Q Did he perform his duties?

A Yes, sir, he did.

Q Did you take any action with reference to these two men

at the end of the voyage?

A Well, I took the case of Gonzales up with the Union and had a heck of a time trying to get them to say that I should fire the man. The wanted me to keep the man aboard for some reason or other. They seemed to be all against Boudoin.

OBJECTION: BY MR. KIERR:

I object on the grounds that it is hearsay testimony.

BY MR. WRIGHT:

Q Let me ask you this: at the end of the voyage, did you or did you not fire Gonzales?

A Yes, sir, I did.

Q Did you or did you not have anyone who objected to the firing of Gonzales?

A The Union officials.

Q Where did this objection take place?

A As I remember it, in my office aboard the ship.

OBJECTION BY MR. KIERR:

I object. I admonish counsel that there is no relevancy to the question concerning whether or not union officials objected to the firing of Gonzales. It is not an issue in this case. I object to that line of questioning.

BY MR. WRIGHT:

Q Who was present when you conferred with these union officials?

A I couldn't say. That was a long time ago.

Q Did they state to you why they objected to your firing Gonzales?

A Well, in fact, they told me --

OBJECTION BY MR. KIERR:

I object to the man giving any hearsay testimony. Mr. Wright I want you to admonish the witness not to quote those persons.

BY MR. WRIGHT:

I believe that that information is admissible and subject to your objection which you can raise at the time of the trial.

Q Can you state, Captain, whether or not and you can answer the question yes or no, whether or not the union officials stated to you the reasons for their being opposed to your firing Gonzales?

A I do not remember.

Q Can you state whether or not they stated to you that they were opposed to you firing him?

A They were opposed.

Q What, if anything, took place with reference to Boudoin at the termination of the voyage? Did he remain with the ship or did he get off the ship?

A He got off the ship.

Q What was the purpose of his leaving the ship?

A I wouldn't know, today.

Q Do you recall whether or not he reported to the hospital?

A He must have, but the union can explain that better than I can. They were against Boudoing and for Gonzales. Of course, to me it was just two men fighting.

Q Captain, do ---

OBJECTION BY MR. KERR:

I object. The witness' statement and comments are incompetent and I object to them and request counsel not to seek to have the witness make such gratuitous and irrelevant comments.

BY MR. WRIGHT:

Q How are seamen employed aboard your vessel? Where do you get them from?

A We put in to the company and the company calls the union and the union assigns the men. The man comes aboard with a slip.

Q How many different unions are involved with unlicensed members of the deck department?

A One.

Q What union is that?

A The N.M. U., National Maritime Union.

Q Can you state whether both of these men are from the same union?

A Yes, sir, they have to be.

Q What about the unlicensed members of the engine department?

A They are all from the same union.

Q And by whom, did you say, are the non-licensed members of the crew furnished the vessel?

A When we need a man we call the office of Lykes Brothers and they call the union and the union assigns the man to the ship.

Q When a man is referred to you by the union do you have

remember?

A Nothing that I remember.

Q Did Boudoin have any particular characteristics?

A Well, not too much. He was aboard the ship on the job. He was a little slow speaking.

Q Did Chief Officer Staggers -- is Chief Officer Staggers still assigned to the Mason Lykes?

A Yes, sir.

Q Does he have any difficulty in hearing?

A Well, he has a slight defect in that respect. He's not exactly deaf, but he's hard of hearing.

BY MR. WRIGHT:

That's all.

BY MR. KIERR:

Q Have you refreshed your recollection in regard to these matters by examining any log books?

A No. I have read my statement over.

BY MR. KIERR:

Mr. Wright, may I have it, please?

BY MR. WRIGHT:

Q Aside from your statement did you read a copy of the log?

A No, I just read my statement over th : I made.

Q Well, I think that after reading your statement I read also to you portions of the log as we were talking the matter over before you testified.

A But, you read it, I didn't.

Q But, you refreshed your recollection from this copy, did you not?

A Yes, sir.

BY MR. KIERR:

Q When is the last time you saw this copy of the entries in this official log?

A Well, it was after I turned it in, after that voyage. It's been over three years.

Q You did not see it today?

A No. Mr. Wright read that off to me and I read the statement.

Q How much of it did he read to you?

A I expect he read the whole thing, right on through.

Q Are you presently the Master of the S. S. Mason Lykes?

A Yes, sir.

OBJECTION: BY MR. WRIGHT:

I object. He has testified to that already.

BY MR. KIERR:

Q Have you worked for any steamship company other than Lykes?

A No, sir.

OBJECTION: BY MR. WRIGHT:

I object. We have been over that already.

BY MR. KIERR:

Q Do you remember the occasion some three years ago when Elie Boudoin was injured aboard your vessel?

A I do.

Q What was the first knowledge you had that something of an unusual nature had occurred?

A I believe it was 2:00 o'clock in the morning when I was

called up by the Chief Officer saying that a man was injured in a fight. I put on my bath robe and saw this injured man in the fireman's wash room.

Q What was he doing, Captain?

A Just standing there. So then I made sure that the doctor, the passenger we had there, was called out and I went with the man to the hospital, opened it up and the doctor and me took care of the man from that time until sometime later in the morning.

Q About how long was it before this treatment of Boudoin was completed?

A Well, I would say from whatever time they woke me up which was sometime in the vicinity of 2:00 o'clock and I remember it was after 4:00 o'clock when we put him to bed in the hospital and I went to interview the other fellow.

Q What other fellow?

A Gonzales.

Q Why did it take so long to treat Boudoin?

A We had to cut his hair. You know how a doctor works there, we had to shave his head.

Q What was the nature of his injury?

A He had a cut on the back of his head in the shape of a "V", a "Y", I should say.

Q How long was it?

A As I remember, if I remember right, I think he took eighteen stitches; there was quite a few stitches.

Q Was it doing any bleeding?

A Yes, sir.

Q Do you know how much bleeding?

A Well, my statement, reading it over I said I found him standing in the wash room with blood running down the back of his neck.

Q Did the doctor have to ligate a vein or artery?

A Far as I know, I don't think so. I don't know much about it, but I watched him do it, I watched him patching him.

Q Was Boudoin conscious or unconscious?

A Conscious.

Q Was he or was he not somewhat of in a daze?

A I wouldn't know that. He wanted a cigarette and I got a pack of cigarettes for him and he smoked a cigarette.

Q Did you or did you not have any trouble with Boudoin?

A I never had any trouble with Boudoin.

Q I mean on this particular night in question.

A No, what he wanted was to be fixed up.

Q During this treatment in the ship's hospital, during this time, do you know where Gonzales was?

A Yes, sir. He came around the door several times. I don't know whether he felt bad about it or not, but he wanted to give him a blood transfusion or something else and all we wanted to do was get rid of him.

Q Can you tell me whether or not he was making a nuisance of himself?

A Well, I'd say he was a niusance as far as I was concerned.

Q Did you have to make any threats to Gonzales at that

time or not?

A No, I told him if he didn't go to bed and go to sleep I was going to put him in irons, two or three times.

BY MR. WRIGHT:

I would like the record to reflect that in between questions being propounded to the witness Mr. Kierr is reading from either the statement which I furnished him or the log book entries.

BY MR. KIERR:

Let the record show that I, at this time, give them both back to Mr. Wright.

BY MR. WRIGHT:

I would like the record to reflect that Mr. Kierr in preference to reading these statements is now reading photostatic copies of statements, probably the same one which he secured from the Coast Guard.

BY MR. KIERR:

For your edification, Mr. Wright, I should like to tell you that I have read the Master's statement and the log book entries many times before coming here and I have read them while here and if your remark was intended to convey that I have read the statement and the documents and am reading them to myself now you are entirely correct. If what you meant to convey is that I am reading them to the Captain, you are incorrect. At such time as it is determined that I should read the statements or documents to the Captain I shall do so and the record will clearly reflect it.

BY MR. WRIGHT:

I merely wish the record to reflect that your cross-examination is based upon questions which are being asked of the Captain concerning his log entires and statement which you have before you and which he does not have before him.

BY MR. KIERR:

Is there anything wrong with that, Mr. Wright?

BY MR. WRIGHT:

There is nothing wrong with it, but I think the Jury is entitled to know it since they are going to appraise the deposition from cold black and white and without the witness being before them. I think they are entitled to know the procedure you have adopted to follow.

BY MR. KIERR:

Do you think I have some reason for not wanting to disclose that I am reviewing these various documents as I have during the examination of this witness?

BY MR. WRIGHT:

I don't know what is going on in your mind. What do you think I am.

BY MR. KIERR:

I will thank you to let me have the originals of those two documents.

Q Is it clear to you, sir, that while I am asking you these questions that I have in my left hand what purports to be a duplicate original of the official log book entry and in my right hand what purports to be a photo-copy of your original statement, both of which have been furnished to me

by Mr. Wright?

A I understand.

Q Do you have any objection?

A No. All I want to do is to get it straightened out.

BY MR. WRIGHT:

We have no objection to it.

BY MR. KIERR:

Q And for the purpose of any question which I may ask you from now on, Captain, you may assume that I have these documents before me while I am propounding such questions.

A Yes, sir.

Q And further, Captain, if any time you wish these documents, simply ask me for them and I will be pleased to hand them to you with Mr. Wright's concurrence.

A Yes, sir.

Q Do you recall whether or not you heard Gonzales admit or deny responsibility for Boudoin's condition?

A I am quite sure he admitted it while we were treating Boudoin.

Q In what manner did he cause that condition, if you learned it?

A What do you mean by that, please sir?

Q When we refer to Boudoin's condition, what do we mean, Captain?

A His cut head.

Q Do you know what caused the cut on the head?

A Well, I didn't see the fight. I was called down there and the rest is my imagination. I saw, eventually, in the

room a broken bottle.

Q In what room?

A In Boudoin's room.

Q You mean his sleeping quarters?

A Yes, sir.

Q Well, did Gonzales admit any responsibility or not with regard to the bottle?

OBJECTION BY MR. WRIGHT:

I object to the form of the question and the use of the word responsibility.

A I would say and don't mind saying that Gonzales seemed to admit that he did the dirty work, what with or how, I don't know.

BY MR. KIERR:

Q Would you mind defining what you mean by dirty work?

A The cut on the head. He might have hit him with anything as far as I'm concerned.

Q Do you recall whether or not while Gonzales was outside of the hospital that night that he had any conversation with the mate on watch?

A I couldn't really say. I know there was a commotion there and the Third Mate on watch was trying to get him away and do as I said, go to bed.

Q Who was there, was it Mr. Brock?

A Yes, sir. Harry Brock, I believe that's his name.

Q Well, having refreshed your recollection and reading your statement, can you recall whether or not Gonzales actually said anything to Mr. Brock?

A No, I wouldn't. At that time the doctor and I were fixing the man up and all I wanted to do with Gonzales was to get him out of the way and keep him quiet.

Q Do you remember whether or not Mr. Gonzales was standing with his arms outstretched across the hospital doorway?

A No, I wouldn't say that. I would say he was standing at the doorway.

Q Would it help you at this time if I gave you your statement to again review?

A I don't think so. I am just here to answer questions. There is no use in my reading it over again. I will tell you just as I remember right now unless you would rather I would.

BY MR. KIERR:

Q With Mr. Wright's concurrence I give you your statement which he furnished me from his file and I ask you to read the fourth paragraph from the top. You may simply read it to yourself for the purpose of refreshing your recollection.

A Well, at that time I knew about it, but that's three years since and I have forgotten the thing. After all you can't remember every incident that happens in a thing like that.

Q Well, Captain, now that you have used the statement which Mr. Wright has furnished me and which you hold in your hand for the purpose of refreshing your recollection, will you tell me whether or not at one time Mr. Gonzales stood at the hospital door with his arms outstreteched across the door way?

A Now that I put it in my statement it must be a fact.

Q Captain, will you tell us of the conversation, if any, which transpired between Gonzales and the Mate on watch at the time?

A I couldn't tell you.

Q Having refreshed your memory from that statement . . .

A Yes, sir, I have it in the statement there that he threatened Mr. Brock, the Mate on watch.

Q Now, what is meant by the Mate on watch?

A The officer of the deck there at the time. You see, they stand certain hours, the different mates.

Q Where does he stand that watch?

A Anywhere on the ship, he could be on the bridge, loading cargo or anywhere.

Q Was he or not the officer in charge at the hospital at that time?

A Well, of course, no one is in charge of the hospital. When he reports the incident to the Mate the Mate calls me and we open up the hospital and there you are.

Q Was he or was he not still the Mate on watch while you all were in the hospital?

A Yes, sir.

Q Now, what terminology did Mr. Gonzales use in addressing the Mate on watch?

A I wouldn't know now.

BY MR. WRIGHT:

Let the record show that after the witness statement that he . . .

BY MR. KIERR:

You may refer to the statement.

BY MR. WRIGHT:

Don't interrupt me Mr. Kierr until I am finished with my statement. Let the record show that after the witness stated that he cannot answer the question from his recollection Mr. Kierr motioned to him to read the statement again.

BY MR. KIERR:

Q Captain, you remember I told you that you are at liberty to use that statement which I handed you and as much as you want.

A Yes, sir, but you must understand, Mr. Kierr, that's three years ago. We can't remember all those things. Anywhere in the world you have these things happen off and on. What I wrote there must be a statement of facts, but as I said, that's been three years ago.

Q Was that a statement which you prepared in the course of your business?

A Surely.

Q Was that statement part of your official report which you gave to the vessel's owner?

A Yes, sir, this is the statement itself.

Q And Captain, I believe I have requested you to read that paragraph to yourself several times and I believe you have done so. Would you read the concluding part of it again to yourself and tell me what transpired, what terminology was used by Mr. Gonzales?

A It doesn't show that in here in my statement.

Q Well, I believe a short while ago you stated that he, Gonzales threatened the Mate.

A Not a short while ago, three years ago.

Q Well, in your testimony a few minutes ago after referring to your statement did you state that a threat was made?

A Understand that statement was made three years ago and if I made it then it is accurate.

Q Could you tell me this: with regard to any threat was one made?

A It must have been made while the doctor and I were taking care of Boudoin.

Q Does your statement say when it was made and when -- you may again refer to it?

A Well, it is naturally right there. May I read it out loud and that will be my testimony, the whole paragraph? "For the greater part of the time Boudoin was being treated M. Gonzales, Deck Maintainance was outside the door of the hospital making a nuisance of himself. I was busy assisting the doctor at the time and told Gonzales I would put him in irons if he did not stop his gab . . "

Q You are starting from the beginning?

A That's the third paragraph there.

BY MR. KIERR:

Mr. Wright, you have no objection to the Captain reading this into the record?

BY MR. WRIGHT:

All objections are reserved to the time of trial.

BY MR. KIERR:

Q Captain, in view of that reply from Mr. Wright, I am required by the rules of evidence and Court procedure to ask you to give me your testimony in your own words at this time rather than read it. I don't mind your taking as much time as you want to refresh your recollection from your statement from Mr. Wright's file which you have in your hand.

BY MR. WRIGHT:

I submit that he has been doing that on this particular question for about fifteen minutes.

A Will you ask the question again?

BY MR. KIERR:

Q Was the Mate on watch present when these remarks were made?

A The Mate on watch was present, but he was trying to get him to go to his room. You must understand, the doctor and I were busy there. I could shout at Gonzales to go away but I was busy with the other man.

Q For the purpose of the record, could you tell me whether or not a threat was made by Gonzales?

A I wouldn't say that.

Q Did you ever say that?

A It was in the statement and if it is in the statement, it must have been made.

Q You would have to read it again to find out.

A Yes, sir.

Q Please read it again.

A I said, according to the statement, at one time he stood with his arms outstretched across the hospital doorway and threatened the Mate on watch.

Q When did he do that?

A I suppose when he stood there with his arms outstretched.

Q What did he say?

A He wanted to get through and if Mr. Brock touched him he would stretch him out in the alleyway.

Q Who would stretch who out in the alleyway?

A Gonzales would stretch Brock out if he touched him.

Q What does stretching out in the alleyway mean?

A I don't know what he meant. If someone told me they were going to stretch me out in the alleyway I would watch my step with him.

Q Why?

A If somoone met you on the street and said they would stretch you out, you would understand what they meant.

Q Well, that is not a special term in the maritime service is it?

A It seems so in this case, but if anyone told me they were going to stretch me out I think I would know what they meant.

Q Well, what's that?

A That someone was going to clout you with a stick or something else.

Q Did you at any time interview Gonzales in your investigation of these happenings?

A Yes, sir, I interviewed him.

Q Where?

A I believe in my cabin when I opened the official log book -- it must be in there what I said then. He didn't want to admit anything. He didn't want to sign a statement. I had two witnesses up there then. He refused to sign the statement he made. I put that in the official log book.

Q When you say he admitted it, did you mean that he admitted it in writing or verbally?

A Verbally. I would have to see the official log book to get that. You see, in the official log book we have to report that and there are witnesses there to sign the log.

Q When was it that he, Gonzales, told you that he had done the "dirty work"?

A While the doctor and I were mending the other man and he was standing in the alleyway.

Q Do you know who cleaned up the ship's hospital?

A Yes, sir. I had him clean it up the next day after he got up the next morning.

Q Who?

A Gonzales.

Q Did he do it or not?

A Well, he stayed in there a while and did the biggest part of it and then drifted off as I remember.

Q Do you know how long he was down there cleaning up?

A I couldn't say now how long he spent down there.

Q Do you know what he did after he received the orders to clean up the ship's hospital?

A Yes, sir, I learned that he stayed in there a while and

cleaned it up and then disappeared.

Q Where did he go?

A I think he went ashore. As I remember the next thing he was coming aboard the gangway.

Q Was this the same day?

A Following the accident, yes, sir.

Q Did he have anything with him when he came aboard?

A Well, he had a bottle, I know I tossed it overboard, the Mate or I did and I had him put in irons. The bottle was taken away and I put him in irons because I had refused him permission to go ashore.

Q What was in the bottle?

A My guess is that it was some kind of liquor. It may have been soda pop as far as that goes, but I doubt it.

Q What are irons?

A Handcuffs.

Q Where was he taken after he was placed in irons?

A I put him up on the storeroom. We didn't have a brig aboard the ship.

Q Was he restrained to some stationary object in any way?

A Yes, sir.

Q To what?

A A stanchion.

Q Captain, would you refer to that statement of yours which is still in your hands and tell me after you have reviewed it whether you can refresh your memory as to whether the man was carrying one bottle aboard ship or more than one?

A It must have been two bottles then. At the time when I wrote this I knew what it was all about, but that's three years ago now.

Q Now that you have refreshed your recollection you recall that the man was coming aboard with two bottles . . .

OBJECTION: BY MR. WRIGHT:

I object to the form of the question. The witness has not stated that he refreshed his recollection. He stated that his statement must be accurate because of the time he made it, but his present recollection is that he had one bottle.

BY MR. KIERR:

Q Captain, if you refer to that statement and your recollection is refreshed and you want to change your statement, of course, you simply have to say so.

A I will change it and say that there were two bottles.

Q Two bottles of what?

A I don't know.

Q Would you look at the statement and see if it refers to two bottles of anything in particular.

A Yes, two bottles of liquor.

Q Is that what the contents of the bottle was then?

A I wouldn't know. They were immediately thrown overboard.

Q What was the next thing that you did after chaining Gonzales to a stanchion in the locker room?

A As I remember, after some little while, some few hours, somebody came by and said that Gonzales wanted to see me. I went up there and he seemed to be pretty sober at that

time and asked me please turn him loose and he would behave himself. I turned him loose and from that time to the end of the voyage I had no more trouble with him.

Q From the time that you placed him in irons until he sent for you did you do anything regarding Gonzales?

A I don't believe so.

Q Did you communicate with anyone concerning him?

A Are you talking about the police?

Q What, if anything did you do regarding Gonzales?

A At the time I put him in irons I don't think I talked to anyone or did anything about it. That was during the afternoon when he returned to the ship and I think it was about 6:00 p.m. when I turned him loose again.

Q Would you refer to that statement and see whether it will refresh your recollection concerning the time element?

A Well, in other words it was instead of morning it was after I ironed him up that I asked the shore police to take him.

Q Can you tell me whether or not your statement says that you put him in irons and at the same time made this request of the shore police?

A After I put him in irons approxiately at the same time I requested the shore police to take him in custody for safe keeping.

Q Do you or do you not mean the shore police at Walvis Bay

A They only have on policeman there.

Q Did he come aboard or not?

A He must have come aboard because he refused to handle

it unless I would leave him behind there. It is just a small town there.

Q I believe you used the word "safe keeping."

A Yes, sir.

Q What do you mean by that?

A My idea of safe keeping is safe keeping. If you have a man put away in jail he's safe.

Q Safe from what or for what?

A Safe keeping.

Q What would be accomplished, Captain, by putting him in jail as you put it that would not be accomplished by his not being incarcerated? What was the purpose of this safe keeping. To begin with I have no brig, I have no jail. I have a little storeroom where we get a lot of fresh air and I could keep him up there, I had him ironed to a stanchion. There are no doors or anything to lock him up. Safe keeping, I knew if the shore police took him ashore he would be in safe keeping until I sailed. That seems to me to be safekeeping.

Q Can you tell me whether or not you were trying to guard against something by putting the man in safe keeping?

A Just guarding from getting in any more trouble. I put him in irons up there, but I can't keep a man up there indefinitely and that was the reason for my asking the police to keep him.

Q Can you tell me if you were trying to get the police to take him so that no one else would get cut up?

A Well, I couldn't say that, Mr. Kierr. You have fights

aboard ships and then the next day its all over.

Q I believe you indicated that when you saw him in your improvised brig aboard the vessel Gonzales was sober or was he not sober?

A He had sobered up by that time. That was in the evening. I put him in there when he first came from shore.

Q Why did the police want you to leave him in Walvis Bay?

A Because if they took him ashore they would have to hold him for a trial. That's the English law down there. Some day in the future when the Judge came down; in other words I wanted to take him home and they wouldn't take him in there.

Q What trial are you referring to?

A In the British Courts of law.

Q A trial involving what?

A Well, if I asked the police to arrest him and keep him in custody it would be the same as if he was drunk and was put in the City jail.

Q Why did you ask them to arrest Gonzales?

A Because I didn't want to keep him up there. I didn't know how long I would have to keep him up there. There was no proper place aboard the ship to bring him.

Q What do you mean when you say that you didn't know how long you would have to keep him up there?

A I just didn't know. As it turned out, that afternoon about 6:00 pm the man asked me to come up there and see him. I went up and he was sober and he promised that he wouldn't drink any more. I turned him loose and after that,

for the rest of the voyage I didn't have any trouble with him.

Q You don't know what -- you didn't know what would happen when you first put him in there, did you?

A What do you mean by that?

Q Well, did you or did you not? When you chained him to the stanchion you didn't know how long you would have to keep him there.

A No.

Q Well, can you tell us for what reason you would have to keep him there?

A Well, I had to keep him there until I was quite sure that he was sober. He had disobeyed my orders when he went ashore and came back with a bottle or two bottles. I assumed that he needed and he did need locking up, restraint of some sort. He disobeyed my orders and I didn't want him to go ashore again.

Q Can you tell me whether or not you mean by restraint, preventing the man from doing any harm?

A Well, I would say to himself or to anyone else as far as that goes.

Q How long did you intend to so restrain Gonzales?

A Until I was sure that he was sober.

Q Is it necessary to restrain every man who is intoxicated?

A No.

Q What made it necessary to so restrain Gonzales?

A Because he had gone ashore without permission after I

restricted him to the ship and he had come back again with a bottle or two in his hand.

Q Do you customarily restrain crew members who fail to follow your orders?

A Occasionally. The Master of the ship has that authority to restrict members of the crew shore leave.

Q Have you or have you not had occasion before to place a man in irons because they failed to obey an order?

A I think so.

Q How often, Captain?

A Very seldom, once in five or six years.

Q May I ask you this: in all candidness, did Gonzales' actions with regard to Boudoin have anything to do with your putting him in restraint or not?

A Well, that's a hard question to answer. The man, after the fight and after we got through with the man, Gonzales went to bed to sleep and was quiet and we had no trouble at all with him. He was just like a lamb. However, I restricted him to the ship and when he disobeyed my orders and went ashore and came back with a bottle I just, naturally, put him in irons.

Q Can you tell us whether or not his attack on Boudoin had anything to do with your putting him in irons?

A No, this is after the fight. The next day or later on that same evening.

Q When you referred to a trial a few minutes ago did you mean a trial in a Court such as to find out if a man is guilty or innocent?

A I don't know what the English law is, but it is a case of a Judge following it up and it is a small town, perhaps it would be two weeks.

Q Do you know whether or not the law required that some charge or complaint be made against the man before he is tried?

A I wouldn't know down there. I just did my duty when I got back to the States and reported it to the Coast Guard.

Q Do you recall whether or not you told the police that you wanted to put Gonzales in jail?

A No. There is only one constable in a small town like that. I suggested that he lock him up down there until such time as we would sail. They said that they couldn't do it unless I would leave the man in jail awaiting this Court of Judge or whatever it is that comes along.

Q Why did you not leave him in jail?

A Why should I leave him in jail, then I would be two men short.

Q Who was the other one?

A Boudoin.

Q What do you mean by short?

A Well, not working.

Q Do you mean that the vessel then would have two men less in the crew performing the work?

A Yes, sir.

Q If Gonzales had been left behind, do you know on what charge he would have been tried?

A Not the least idea. I didn't want to leave him behind,

I just wanted to put him in custody for a couple of days until we got ready to sail. I knew darned well if I put him in jail for a couple of days he would be ready to go.

Q Would they have tried him for disobeying your orders?

A I couldn't say.

OBJECTION BY MR. WRIGHT:

I object to the question and instruct the Captain not to attempt to answer or speculate on the foreign policemen as to what they would have done. Don't answer the question pertaining to foreign police or their laws, Captain.

BY MR. KIERR:

Q Can you tell us whether or not Gonzales was restricted in any way beyond the date or day of these events?

A He was restricted until we sailed from Walvis Bay which was about a day and a half.

Q In irons or not?

A I put him in irons when he disobeyed my orders and went ashore and came back. About 6:00 o'clock that night he sobered up and promised me that he would behave himself and wouldn't drink any more or go ashore and I turned him loose at that time. I think I told you that before and I had no further trouble with him.

Q Did you or did you not give him any orders about going ashore after that?

A No, I restricted him to the ship. I told him to stay aboard.

Q Then I take it that you did give him an order.

A I must have because I wouldn't turn him loose unless he

promised me that he would stay aboard.

Q Am I now to understand your testimony to be that during the evening of that day of this attack you told Gonzales that he wasn't to go ashore any more while in that port?

A When he asked me to come up and talk to him while he was in irons he was pretty sober at the time and I turned him loose. I took the irons off him and he said that he would behave himself and naturally I restricted him from shore leave.

BY MR. WRIGHT:

Might I suggest that you ask the Captain the direct question pertaining to whatever you are driving at rather than have the same question asked him four or five times.

BY MR. KIERR:

Mr. Wright, if it has not been apparent to you up to now it might be necessary to tell you that I have been seeking to avoid leading this witness even though he has been tendered as your witness under cross-examination.

Q Captain, I don't know if you understood what was meant by my comment to Mr. Wright?

A I understand.

Q I don't want to put words in your mouth or lead you Captain.

A I understand.

BY MR. WRIGHT:

The facts are so undisputed there is no reason why you shouldn't lead the witness and get the information on record. Why do you want to continue to repeat things over and over

again? You have been over the same things three or four times at least and possibly four or five times and I surely hope that we don't have to burden the jury with answers to the same questions over and over again.

BY MR. KIERR:

Q With Mr. Wright's permission, I shall lead you to this extent: Mr. Wright referred to a jury. It is possible that your testimony will be read to laymen and when you said that you told the man he was restricted while in that port didn't you mean that he was supposed to be confined to the ship and was not to cross the gangway of the ship to go ashore, isn't that what you mean?

A Absolutely.

Q Did he or did he not obey that order?

A After that he did as far as I know.

Q Do you mean as far as you know or as far as you remember?

BY MR. WRIGHT:

What's the difference, Mr. Kierr?

BY MR. KIERR:

Q What would be the answer to my question, Captain?

A Well, as far as I remember.

Q Did you or did you not have to log Mr. Gonzales for any further disobedience of your orders after the last order which you gave him, that is that he would be restricted him to the ship once you let him out of irons?

A Yes, sir. I had to log Gonzales for other people standing this man's watch, etc. Just the usual routine.

Q Captain, after you released him from irons and told him to stay on the ship, did you have to log him for anything else after that?

A If I remember, I did log him for disobedience of orders. I think it was four days pay. Later on, as I remember, I had him pay the charges, which was the same as logging him, for people standing the other man's watch. It is all in the log book there, but after all, that's been three years. It must be in the log book. I can't log a man without putting it in the log book.

Q Before we get to the loggings, let me refresh your memory again by resorting to this statement which you have had. Please read it and tell me whether or not there is any refreshment there concerning the cause of Mr. Gonzales' disobedience.

A I logged Gonzales two days pay for being A.W.O.L. on the 25th.

Q Can you tell whether or not Mr. Gonzales disobeyed any order of yours after you released him from irons?

A Off the record, I don't believe I did.

Q Well, on the record, look at your statement and tell us.

A I logged Gonzales two days pay.

Q What, if anything, did he do that day?

A All right, then he did go ashore after that.

Q What do you mean by he did go ashore after that?

A After the time I turned him loose out of irons.

Q Was that in accordance with your orders or not?

A That was disobedience. I restricted him to the ship.

Q Was that in disobedience of your orders?

A That was disobedience of my orders.

Q How long did he remain away after being released from irons according to that information?

A He returned on the 28th.

Q How many days was he absent?

A A day and a half.

Q Do you recall whether or not that officer on watch, Mr. Brock, made a report to you, an official report to you concerning Gonzales having an instrument in his hand?

A I don't remember.

Q Do you recall whether or not Gonzales at any time had a knife which had to be taken away from him?

A I didn't see it.

Q May I ask counsel to furnish me the statement of all witnesses which are referred to in this copy of the official log as being attached to said log?

BY MR. WRIGHT:

Don't you have all of them?

BY MR. KIERR:

I have here photostats and I would like to produce at this time to the Master the duplicate originals which you have in your files.

BY MR. WRIGHT:

All I have is copies of the statements. I don't have the original statements.

BY MR. KIERR:

The copy of the log would appear to bear the Captain's

signature and that copy refers to statements attached thereto. Are there none in your files?

BY MR. WRIGHT:

Yes. The same ones which you have.

BY MR. KIERR:

With the signatures of the parties affixed thereto.

BY MR. WRIGHT:

No. Copies of the statements of the witnesses. Copies of the statements which were handed to the Coast Guard and which you have copies of.

BY MR. KIERR:

Are they signed copies, Mr. Wright or merely conformed copies.

BY MR. WRIGHT:

Conformed copies.

BY MR. KIERR:

With no signature thereon?

BY MR. WRIGHT:

That's right.

BY MR. KIERR:

Yesterday evening I gave to the reporter photostatic copies to be annexed to the testimony and I take it that this reporter, being a different individual does not have them in his possession. Is that right Mr. Echezabal?

BY THE REPORTER:

No, sir, I do not have them.

BY MR. KIERR:

Inasmuch as my file is not complete for that reason would

you not expedite that matter by giving me those statements which you have?

BY MR. WRIGHT:

You claim that you don't have a copy of all of the statements with you?

BY MR. KIERR:

Not all of them. There was, for example, a statement signed by Mr. Staggers where he said that Gonzales refused to make a statement and refused to sign to that effect. That, I don't have.

BY MR. WRIGHT:

You mean Chief Officer Staggers, you don't have that because you gave that to the reporter.

BY MR. KIERR:

Yes, sir.

BY MR. WRIGHT:

I see no reason why I should produce Chief Officer Staggers' statement. He has already testified.

BY MR. KIERR:

I would like to call for the production of all witnesses' statements which were attached to the copy of the official log and incorporated therein by reference.

BY MR. WRIGHT:

I realize, Mr. Kierr, that you would like to call for it.

BY MR. KIERR:

In fact, I do call for it.

BY MR. WRIGHT:

I don't intend to produce statements to you that you

have. If you will specify something which you don't have I will consider your request if it is admissible. But, the Captain handed in all of the statements to the Coast Guard and you made photostats of them. If there is some particular request that you want I will consider it. I will not produce Chief Officer Staggers' statement because I don't see where that has any bearing on the Captain's record. The Captain does not remember all that the Chief Officer remembers and I see no reason why I should let you confuse the record any more than you have already confused it.

BY MR. KIERR:

Q I hand you at this time what purports to be a duplicate original carbon of the copies of the entries in the official log of the Mason Lyles regarding these statements.

A Yes, sir.

Q When was the last time you saw that?

A When I turned it in to the Coast Guard three years ago--you mean this thing?

Q Yes, sir.

A Mr. Wright read it to me today, most of it, didn't you Mr. Wright?

BY MR. WRIGHT:

Yes, sir.

BY MR. KIERR:

Q When was the last time you saw it to read it?

A Three years and some months ago.

Q Do you recognize it as having your signature on it?

A Yes, sir.

BY MR. WRIGHT:

I think we have been all over that.

BY MR. KIERR:

Q Can you tell me whether or not that signature -- whether or not that is the signature of Chief Officer Staggers below yours?

A I would say that it was.

Q Would you tell us whether or not that signature on the bottom of that log denotes and represents his approval of those official log entries?

A This down here?

Q Yes, sir.

A This shows that I sent him the log entries and he read them. He was present at the time this man, Gonzales, refused to sign the log. The second signature is just the fact that he witnessed the fact that Gonzales refused to sign it.

Q And his other signature, the one directly below yours.

A That means that he signed it as a witness. In your official log book, Mr. Kierr, there must always be a witness to everything and it is usually the Chief Officer. In other words, his signature must appear in the log book in pen and ink.

Q Can you tell whether or not when he signs below you that he has read the entry and approved of same?

A He should have read them.

Q And approved same.

A No. He don't have to approve them, he signs them as a

witness.

Q Does that log entry refer to statements of various witnesses or not?

A This is my log entries at different times of the day and hour. I wrote them down in the log.

Q Can you tell me whether or not there were any witnesses' statements attached to this document?

A No, sir, I couldn't tell you, I turned them in, the official log and everything else.

Q Can you tell me whether or not there was any reference to statements attached to the log?

A All statements of all witnesses were turned in by me at the end of the voyage.

Q Attached to this log?

A Attached to my log.

Q When you say you turned them in, you mean you turned it in to the owner?

A Yes, sir, and the Coast Guard.

BY MR. KIERR:

Mr. Wright, having no way of knowing what statements were turned in to the owner may I reiternte my request to you to present to me at this time those statements of witnesses and or non witnesses which were incorporated by reference in this official log book entry?

BY MR. WRIGHT:

To begin with, your statement is inaccurate and does not reflect what the Captain said. He did not state that he attached any statements to the log entry. He said that he

handed them into the company with a copy of the entry and also handed them into the Coast Guard.

BY MR. KIERR:

Q Did you hand any statements into the company that you did not hand to the Coast Guard?

A Well, as far as the Coast Guard is concerned they got the official log book.

Q Did you give any statements to the Coast Guard?

A I turned in all of the statements to the Company. The official log book goes to the Coast Guard.

Q You didn't hand any statements to the Coast Guard?

A I don't believe I did. I don't know. I am quite sure that I didn't. I turned them into the Company and they turned them over to the Coast Guard.

Q They Company turned them over to the Coast Guard?

A Yes, sir.

BY MR. WRIGHT:

Our position is that you have a copy of all those statements. I will be willing to check the statements that I have and if I have any statements other than you have, in other words, any statement that was not turned into the Coast Guard, I will give you copies of them, which I don't have to do, incidentally, but, notwithstanding the fact that the law does not require me to do so, I will do that. Is that satisfactory, Mr. Kierr?

BY MR. KIERR:

Nothing will substitute, Mr. Wright, for the production of the documents which I have requested and I am constrained

to observe that I don't see the reason for your declining to produce the documents at this time.

BY MR. WRIGHT:

The reason I won't produce the documents is as I have stated to you before. You stated that you handed the statement to the reporter yesterday. I don't want you to read isolated parts of that statement to this witness for the purpose, which in my opinion, is a desire on your part to confuse factual issues in this case.

BY MR. KIERR:

For the Court's edification I request that counsel's remarks be stricken and expunged from the record.

BY MR. WRIGHT:

You asked for my reason for the position which I took and I answered you.

BY MR. KIERR:

I asked for a legitimate reason.

BY MR. WRIGHT:

I think that the Court will decide whether or not my reason is legitimate after reading the testimony and cross-examination.

BY MR. KIERR:

Subject to the reservation of our rights to object to the introduction by the defendant its deposition of the Master, I will proceed with my examination.

BY MR. WRIGHT:

The deposition of the Master, what do you mean by that?

BY MR. KIERR:

Specifically this: that if you refuse to produce to me

documents at this time which you should produce . . .

BY MR. WRIGHT:

I disagree with you on that. I say, first of all, that you have a copy of every document that I have. That is, with the possible exception of Chief Officer Staggers' statement which we both covered yesterday with the Chief Officer.

BY MR. KIERR:

It so happens that I have a copy of Chief Officer Staggers' statement.

BY MR. WRIGHT:

Then, you have a copy of everything that I have, but I told you that if you want me to check the Coast Guard list against what I have, I will do so.

BY MR. KIERR:

What about the statement of the Third Assistant Engineer, Mr. Williamson. Am I to infer that you don't have that?

BY MR. WRIGHT:

Yes, sir, I do and so do you.

BY MR. KIERR:

Is that all you have?

BY MR. WRIGHT:

I have copies of all those which you have.

BY MR. KIERR:

That is no stipulation, Mr. Wright, and I object to the statement you made in the record. You don't know what is in my file and I don't know what is in yours and I am not

interested in turning my file over to you.

BY MR. WRIGHT:

And I feel the same way.

BY MR. KIERR:

And I am not asking you to turn your file over to me. However, the Captain has identified an official log entry which constitutes part of the ship's official records and which was covered in the ship's business and incorporates by reference the statements of witnesses and I say to you that you have to produce to me -- that you have produced to me only part of that record when you have failed and refused to give me the statements referred to therein.

BY MR. WRIGHT:

I am obligated to give you anything that this witness used to refresh his recollection, but I am not obligated to give you any portion of my file. This is not a discovery proceeding we are having here and if I have anything from any of the witnesses which is not incorporated in the Coast Guard record I will be happy to furnish you a copy of them, notwithstanding the fact that I am not obligated to do so.

BY MR. KIERR:

Q I show you what purports to be a photostatic copy of an original statement signed by Harry F. Brock -- I must apologize to you for the poor quality of this photostat, are you able to read the words on Mr. Brock's statement?

A Surely.

Q Would you read that to yourself, please?

A Yes, sir. I have read it.

Q Was that a statement which was prepared in the course of your investigation aboard ship at the time of the investigation involving those log entries which you have before you?

A Yes, sir.

Q Do you recall now that you have read that statement, Mr. Brock reporting to you that he met Gonzales coming out with a large knife in his hand?

A You understand that this statement was prepared after this affair was over.

Q Yes, sir.

A This statement was prepared for my reports, reporting the whole affair.

Q To whom?

A To the company.

Q Your official reports.

A Yes, sir.

Q On ship's business?

A Yes, sir and I turned it in along with the rest of them.

Q When Brock reported to you that he met Gonzales with a large knife in his hand . . .

OBJECTION BY MR. WRIGHT:

I object to the form of the question.

BY MR. KIERR:

Q When was it that he reported to you that he saw him with a knife in his hand?

A The date of this thing was the 25th of November, when I wrote the statement.

Q Can you tell me whether or not that was when Mr. Brock was going into the crew's mess?

A He states no.

Q Do you know whether or not Gonzales was permitted to keep the knife?

OBJECTION BY MR. WRIGHT:

I object to the form of the question.

BY MR. KIERR:

Q According to the official reports.

A There is no doubt that the knife was taken away from him at that time. I don't know that, I wasn't there.

Q Why do you say that there is no doubt about it?

A Well, you are not going to leave him with a knife in his hand.

Q Why was it that you didn't let him have the knife?

A Well, mister, you don't let a man have a knife after he had a fight.

Q Was it stated to you in Mr. Brock's report that the knife was taken away from Gonzales?

OBJECTION BY MR. WRIGHT:

I object to the form of the question.

A You know, that's Mr. Brock's statement.

BY MR. KIERR:

Q Well, please refer to the statement which I understand was compiled on the part of the ship owner and tell me whether or not it was reported by Mr. Brock that he, Mr. Brock took the knife away from Mr. Gonzales.

OBJECTION BY MR. WRIGHT:

I object.

A I can't answer yes or no unless I explain.

BY MR. KIERR:

Q Please do.

A This statement was made out the following day after everything was over and everything was done. You see, I was in the hospital fixing the man up at the time. He didn't report to me that he met him with a knife, I doubt it. But, he said in the statement here; let me read this thing and it will straighten us all out.

Q Was Mr. Brock's statement made in the course of your investigation?

OBJECTION BY MR. WRIGHT:

I object. That is a legal question. You are trying to put law in the captain's mouth. I think the Court knows the circumstances under which the statement was taken and the Court will rule on the question. Why do you ask the Captain a question on a rule of law.

BY MR. KIERR:

Q When I showed you Mr. Brock's statement today can you tell whether or not that is the first time you have seen it?

A No.

Q When did you see it before?

A When he turned it in to me.

Q You read it?

A I helped put it on the ditto machine. We made seventeen copies of each statement. We made these things out on board

ship on the ditto machine.

Q Referring to his original statement which I shall ask the reporter to . . .

BY MR. WRIGHT:

Referring to the ditto copy of the statement.

BY MR. KIERR:

. . . I ask the reporter to identify it as Townsend -1, when was that run off on the ditto machine?

A As soon as we got it, probably after we got to sea.

Q Why did you run off so many copies?

A That is customary of every report whehter it is a collision of the ship or anything else.

Q What was done with the seventeen copies?

A I turned them into the office, all except the ship's copy.

Q Do you recognize the statement of Mr. Staggers?

A I recognize the signature, but he made the statement at that time there. You must understand, Mr. Kierr, that has been three years ago.

Q Can you tell me whether or not Mr. Staggers' statement also was one of those made in the course of compiling this official log aboard the vessel?

A I believe so, yes, sir.

Q Was it also one of those which were put on the ditto machine by you?

BY MR. KIERR:

The witness shakes his head affirmatively.

Q How about the statements which I hand you now?

A These, I guess are a part of the whole report, but I don't remember these too well. I would guess that that is part of the official report.

Q You are referring to Andrew Brown and Ernest Coutee.

A Yes, sir.

Q Let us look at the contents or substance of these two statements and see if they refresh your memory to any extent.

A Yes, sir.

Q Do you find that Mr. Brown's statement supports the Third Mate, Mr. Brock to the effect that Mr. Brock was trying to get a knife away from Mr. Gonzales?

A It is very apparent from what he says.

Q What else does Mr. Brown say regarding that?

A You understand that this happened before I woke up.

Q You may read the language of Mr. Andrew Brown in that statement.

A Well, I can't say anything about it. The man made a statement to the effect that he did help the Third Mate and I take it as true because they were witnesses at the time.

Q Mr. Brown states that he stepped up and took the knife away from him that he intended to use on Boudoin.

A That's what he says.

Q Now, let's refer to the statement of Coutee.

A Yes, sir.

Q Would you read that to yourself and see whether or not you will recall that that was a statement covered by your official report?

A It is a copy of a statement made by these people.

BY MR. WRIGHT:

He told you that he didn't know.

BY MR. KIERR:

Q Have you had a chance to read Mr. Couttee's statement?

A Yes, sir.

Q Do you recall that that was one of them made also on that date, November 25, 1949?

A Mr. Kierr, I am going to ask you to let me see all of those statements before I say anything more. That is my signature on there. That is three years ago. To me it was no more than another fight aboard ship.

Q If you saw those statements on ditto, on the ditto machine you would then recognize them as something that you did on the ditto machine.

A I think so.

BY MR. KIERR:

Would you please let me have the statement that I originally requested?

BY MR. WRIGHT:

Do you recognize that as statements that you did ditto? How about the signature of the Third Assistant?

A I think so.

BY MR. KIERR:

May I have the ditto statements so that I shall not be impeded in my examination, Mr. Wright?

BY MR. WRIGHT:

We have been all through this before and I have previously told you my position on this.

BY MR. KIERR:

Subject to our objection, we shall proceed.

BY MR. WRIGHT:

All reservations were made at the beginning, what do you want to repeat that for?

BY MR. KIERR:

The reservation concerning the use by the defendant of the Master's statement, testimony as the defendant's witness, which objection, if sustained, will have obvious results.

Q Captain, do you know Mr. Robert G. Williamson, the Third Assistant Engineer?

A He used to be, yes, sir.

Q I would like to read to you what is purported to be in his statement:

"S.S. Mason Lykes

Walvis Bay, S.W.A.

November 25, 1949

Voyage #8

STATEMENT OF ROBERT G. WILLIAMSON, THIRD ASSISTANT ENGINEER, RELATIVE TO THE ASSAUTL OF MANUEL GONZALES, DECK MAINTENANCE, UPON ELIE J. BOUDOIN, OILER, ON NOVEMBER 25, 1949 AT WALVIS BAY, S.W.A.

The above incident took place early in the morning during the 12 to 8 a.m. port watch, of which I was the Watch Engineer. About to or two-fifteen a.m., the fireman on watch, (Coutee), was relieved by the Oiler to go up for coffee in the crew's mess. Thirty minutes later he came back down and related to me what had happened on the crew's

deck and what part he had taken in it. I then went up topside to the port side of the crew's deck, arriving there just ahead of the Captain and the doctor, where I saw Boudoin standing in the oilers and firemens head, bleeding from a cut, apparently on the right backside of his head. Mr. Staggers was present, as were several over members of the crew. Following the arrival of the doctor, I was in attendance in the ship's sick-bay most of the time while he was treating the oiler.

However, as outlined above, I did not witness any part of the actual incident leading to Boudoin's injury - the only picture of what I have is derived from facts gathered from talking with the fireman and one or two other members of the crew. I had, as well, one or two occasions to talk to M. Gonzales outside of the sickbay, he mentioned to me in so many words how he would like to do away with the oiler- he then shouting into the sick-bay at the oiler, 'Hey you stupid coyote . . . etc., etc.' At several other points I heard him repeat over and over again, 'Now I have this on my hands.' At one instance he stood with both arms over the doors entrance, refusing to permit the Mate on Watch, Mr. Brock to enter on the pretext that. . . 'I am protecting this guy . . . I've got this thing on my hands, you haven't, etc.'

These statements and other remarks, plus facts reiterated by other crew members to me seemed to indicate (to me) that for some cause or reason, M. Gonzales had been seriously intent on giving injury to Boudoin. It was, in my

opinion, most fortunate for Boudoin, and perhaps, for M. Gonzales as well, that there was a doctor aboard (as a passenger) at the time of this incident.

Signed: Robert G. Williamson

3rd Asst. Eng."

Do you recognize that signature?

A I would say yes.

Q Do you recognize that statement as being the one that Williamson made at the time the official investigation was made?

A As far as I know, yes, sir, Mr. Kierr, it sounds like it.

Q Do you recall the facts to which Mr. Williamson refers, namely these comments made by Mr. Gonzales while he was at the door of the hospital?

A I wasn't paying much attention to Gonzales at the time. As I say, the man was making a nuisance of himself, but I was interested in assisting the doctor.

Q Do you remember referring -- do you remember Gonzales referring to Boudoin as a stupid coyote?

A No.

BY MR. KIERR:

Mr. Wright, I have produced to the Master all of the statements which I have. You told me that after you learned those contained in my file that you would let me have the others -- you would let me have others if there were any others.

BY MR. WRIGHT:

I don't intend to produce any statements at this time.

BY MR. KIERR:

Q Captain, why did you fire Mr. Gonzales?

A I don't want anyone aboard my ship that fights over the first time. One fight and you are gone, that goes for anyone, not only that man but anybody that does it is finished. It is hard enough to go to sea without having trouble aboard the ship.

Q Did you give any orders to your gangway watch not to permit intoxicated seamen to come aboard?

A No, because you have to let them come aboard.

Q Let me finish my question. Without watching him to see that he does no harm to himself or anyone else.

A I never gave orders to the gangway watch to that effect. He has to stay at the gangway and he has a life ring and if a man falls overboard he can throw him the life ring and haul him aboard.

Q Is it the gangway watch's duty to report to the watch if anybody, if any intoxicated seamen come in?

A If they are bad yes, it is part of the routine.

Q The purpose of the gangway watch's giving notification or warning is to prevent the man from doing harm to himself and to other persons?

A If I gave that order, but I didn't give the order.

Q The reason for the routine requiring a gangway watch to inform the watch of inerbriated seamen is to prevent that man from doing any harm.

A As a matter of fact I don't believe that any law requires me to do that.

Q It is only a routine aboard the ship.

A As a rule and I don't believe I gave any such order.

Q I am not saying that you told him that nor am I asking you why that is the law, but I am simply asking you whether the reason for the routine is to prevent the man from doing harm to himself or to anyone else?

A It never occurred to me that way. The only thing about a drunk man coming aboard is that he might fall overboard.

Q It never occurred to you that the man ought to be watched in order to prevent him from doing harm to any other person?

A No, because I had not had trouble with him before. I had no trouble aboard that ship before that day and we had been out approximately three months.

Q To what extent to you permit intoxicants to be consumed aboard ship?

A If the watch sees someone coming aboard with some he takes it away, but if someone comes aboard with it in his stomach or stached away in some way, we can't see it, of course.

Q No, I said consuming it on board ship.

A We don't allow them to have it aboard. If a man comes aboard with a bottle I take it away.

Q Is it against regulations for your crew members to drink aboard the vessel?

A It is against the regulations to have any grog aboard

the ship.

Q Grog means rum, but you are referring to any liquor.

A Yes, sir.

Q Therefore, if a crew member such as Gonzales was drinking aboard the vesselthat would be in violation of the ship's regulations.

A It is against regulations for anyone to bring it aboard the ship, to bring grog aboard ship.

Q Captain, perhaps you don't understand the question. I said this: If Mr. Gonzales, the man you put in irons, drank intoxicants aboard the ship he would be violating the ship's regulations, would he not?

A Yes, sir.

Q And if other crew members saw him drinking intoxicants was it not their duty to see that the regulations were enforced?

A No, they would never report a thing like that.

Q Would you expect them to?

A No.

Q Would you want them to?

A No.

Q Was it their duty or not?

A It wasn't their duty to report it and they wouldn't report it if you wanted them to.

Q Is it one of the duties of the officer on watch to stay awake during the hours he is on watch to maintain peace aboard the vessel?

A Absolutely, in addition to other duties.

Q Does anyone have the right to go into other persons' sleeping quarters without permission?

A That is up to the crew. They associate together.

Q Does a man have a right to consider his quarters, that is his forcastle, as private to himself?

A No, because you usually have two or three men in a room.

Q Let us assume that it is a forecastle with two men in it. Do they have a right to keep anyone else out and consider that they have a right to no intrusion?

A Yes, sir, that's right.

Q A man's sleeping quarters is like his home.

A Yes, sir.

Q A man's sleeping quarters is his castle when aboard ship.

A Well, I have heard of that. Every man's home is his castle whether aboard ship or not aboard ship.

Q Captain, I believe in your direct examination you referred to a union to which the engineering officers belong.

A Yes, sir. They have three unions aboard ship, the Mates the Engineers and the crew.

Q Do the engineering officers belong to a union?

A Yes, sir.

Q Do you belong to a union?

A No.

Q Do the Mates belong to a union?

A Yes.

Q Do you belong to any private trade organization?

A No, no union if you are talking about a union.

Q Can you tell me whether you belong to the Masters, Mates and Pilots Organization?

A I do not. That is a union.

Q Do your deck officers belong to a union?

A Yes, sir, they must belong to it.

Q Unions had nothing to do with these events that took place in Walvis Bay, did it?

A No.

BY MR. KIERR:

That's all.

BY MR. WRIGHT:

Q Captain, during your official investigation did you determine whether or not the crew liked or disliked Boudoin?

A As a matter of fact, from what I gathered he wasn't too well liked.

Q During your official investigation did you learn whether or not Boudoin had been ashore on the night before the difficulty he had with Gonzales?

A I never did really ascertain but I was under the impression that they both had been ashore earlier that evening.

Q Did you learn from your official investigation whether or not they had any difficulty ashore?

A No, I didn't.

Q Did you learn from your official investigation whether or not Boudoin had been intoxicated the night before?

A No, I did not. It would take a doctor to determine that.

Q Did you learn whether or not he had been drunk or drinkin

ashore?

A No, that is just my impression.

Q What is your impression based upon?

A Just working over him and looking both men over.

Q What was the practice on the Mason Lykes at that time with reference to one of the crew members going into a room of another crew member?

A There is no restriction to that. I guess all thier lives they have been going visiting aboard the ships.

Q Was it a violation of the shipping articles for a man to bring liquor aboard the ship?

A Yes, sir.

BY MR. WRIGHT:

That's all.

BY MR. KIERR:

In connection with the witness' testimony I shall ask the reporter to identify the documents referred to during the testimony as follows:

The ditto machine reproduction of the Master's statement which has already been designated as Townsend -1.

The duplicate carbon copy of the official log book entries to be designated as Townsend - 2.

The photo copy of the statements of Brook and Staggers which have already been identified in connection with the testimony of Chief Officer Staggers which I shall ask him to note as Townsend -3 and the photostatic copies of the statements of Brown and Coutee as Townsend -4.

The photostatic copy of the statement of Williamson to

be designated as Townsend - 5.

o-o-o-o-o-o-o

I, Joseph H. Echezabal, a stenographic reporter do hereby certify that the foregoing pages and deposition is a true and correct record of the testimony of the witness George Prior Townsend and the objections and notations connected therewith taken on December 20, 1952; that I am not related to or employed by any of the parties to the action in which this deposition is taken and further, that I am not a relative or employee of any attorney or counsel employed herein nor am I financially interested in this action.

s/ Joseph H. Echezabal

...ooOoo...

DEPOSITION OF CLARKE STAGGERS

Testimony of Clarke Staggers, taken in the offices of Terriberry, Young, Rault & Carroll, 825 Whitney Bank Bldg., New Orleans 12, Louisiana, in connection with the above numbered and captioned cause.

o-o-o-o

APPEARANCES:

For the Plaintiff, Raymond H. Kierr
1746 National Bank of Commerce
New Orleans 12, La.

For the Defendant, Terriberry, Young, Rault & Carroll
825 Whitney National Bank Building
New Orleans 12, La.
By: William E. Wright

o-o-o-o

S T I P U L A T I O N

This testimony is being taken by agreement of counsel. The formalities of signing, sealing, certification are waived, and all objections, except as to form of questions, are reserved to be urged at the time of trial of this cause.

o-o-o-o

CLARKE STAGGERS: after being sworn as a witness in this cause, testified as follows:

DIRECT EXAMINATION

MR. WRIGHT:

Q Would you state your name, please?

A Clarke Staggers.

Q And what is your occupation?

A Chief Mate.

Q What is the highest license that you hold?

A Master's.

Q You do hold a Master's license?

A That's right, yes sir.

Q How long have you held a Master's license?

A About forty-five years.

Q How long have you been going to sea?

A About twenty-five years.

Q And during the time you have been going to sea, how long have you been employed by Lykes Bros. Steamship Co.?

A I have been employed by Lykes about fifteen years.

Q Did you ever sail aboard the Mason Lykes?

A I did.

Q In fact, are you still on that vessel?

A I am.

Q What is your capacity aboard the ship?

A Chief Mate.

Q Did you serve aboard the Mason Lykes in November, 1949?

A I did.

Q Do you remember a seaman who sailed aboard the ship around that time, by the name of Elie J. Boudoin?

A I do.

Q What was his capacity on the ship?

A He was Oiler.

Q And do you remember a seaman aboard the ship during November, 1949, by the name of Gonzales?

A I do.

Q What was his rating aboard the ship?

A Deck Maintenance.

Q Were you in charge of any department on the ship?

A Yes, I was in charge of the Deck Department.

Q Now, as an Oiler, what department was Boudoin in?

A The Engine Department.

Q Did you see Gonzales often, working on the ship?

A I did.

Q Did you witness any difficulty that transpired on the vessel in November, 1949, between Gonsales and Boudoin?

A I did not.

Q Do you know whether or not any difficulty transpired between these two men?

A From the reports he made, and statement he made, and what happened, Boudoin came up to me himself. Do you mean That? After the accident happened? Whatever happened all the other time, Boudoin came up to me and reported that he had a row with Gonzales.

Q Now, would you tell us in a little more detail in your own words exactly what you learned and what you witnessed in reference to what transpired between these two men we have been talking about?

A Up until that time, some time in November - the reason I remember it was November, it was right after Thanksgiving day, the night preceding Thanksgiving day, - I mean after Thanksgiving, - about two o'clock in the morning Boudoin came up to my room and asked for first aid treatment for a cut on his head, and I asked Boudoin what happened to him, and I got up and noticed a pool of blood right on the deck outside of my room. My room is located on the cabin deck, which is the upper part of the ship, and the blood was outside the

door, and he said Gonzales hit him in the head with a bottle. Then I carried Boudoin down, or at least he came down with me, to the hospital on the crew's deck on the port side of the ship, and I realized he had a bad gash in his head and needed a doctor to put stitches in it. At that time we were in Walvis Bay and there were no doctors ashore at that particular time, and they had to come from a place called Swakopmund, which was about fifteen miles from Walvis Bay, and there was no way of transportation except a regular train that ran twice a day, once in the day time and once at night time but we did have a passenger on the ship who was a doctor, by the name of Dr. Seaman. I went and spoke to the Captain and told him the condition Boudoin was in and then he gave me permission to wake up Dr. Seaman to see if he would come down and treat Mr. Boudoin for his head. Well, he came down to the hospital and treated, -

Q You are talking about the doctor now?

A Yes. Dr. Seaman, a passenger on the ship that we was bringing back from Africa to the States, you see.

Q All right. Go on, what did you do?

A And he came down to the hospital and he and I and the Captain washed Boudoin's head off, and he took some stitches in Boudoin's head. I don't know how many, but several stitches were taken in Boudoin's head.

Q During that period of time while you were attending to Boudoin's head, did you see Gonzales?

A I saw Gonzales after Boudoin came to my room. Gonzales was standing in the alleyway outside the hospital door,

Q Yes,

A He was standing right outside the hospital door, and insisted on trying to come into the hospital, and I told him no, to get on out, I didn't want Gonzales in the hospital, nobody else but the Captain and myself and Boudoin, and Gonzales was drinking. I wouldn't say drunk, but just was drinking whisky, and he kept offering to give Boudoin blood if necessary, and always stood by the hospital door while the doctor was attending to Boudoin.

Q Now, before this particular morning when Boudoin needed medical attention, did these two men, as far as you know, ever have any difficulty?

A No, they never had any difficulty on the ship at all between those two men; in fact neither one of them ever gave me any trouble; I never had no occasion to go down below to investigate any trouble between either of them.

Q First of all, let me ask you this, Mr. Staggers: How long was Boudoin aboard the vessel before this incident happened?

A Well, I say approximately two months, two and a half months.

Q During the two months, or two months and a half he was aboard, was he under your supervision?

A Gonzales was, yes sir.

Q Gonzales.

A Yes.

Q And during that period of time, did you ever see him strike or injure anyone?

A I never did.

MR.KIERR:

I object to the leading form of the question.

MR. WRIGHT:

Q During that period of time, can you state whether or not you ever received any report from anyone that Gonzales had been guilty of striking or injuring anyone?

MR. KIERR:

Same objection.

A I never did.

MR. WRIGHT:

Q Can you state for us whether or not Boudoin performed his duties on the ship without giving anybody any type of trouble?

A Boudoin?

Q That's right.

A Boudoin was in the Engine Department. I never did have occasion to have any Engineers reporting any trouble with him.

Q Can you answer the same question with reference to Gonzales?

A Very very distinctly, because he is in my charge and in my department, and he never gave me any trouble at all.

MR. KIERR:

I object to the leading form of the question insofar as it pertains to Gonzales.

MR. WRIGHT:

Q How large a man is Boudoin?

A I would say Boudoin was about five feet seven or eight inches high, and the best of my judgment, I would say he weighed between 140 and 150 pounds.

Q Can you likewise describe Gonzales?

A Gonzales may be about five feet seven, and a little bit heavier built, stronger built than Boudoin, and I would say he weighed between 150 and 160 pounds.

Q Now, after the events which took place that morning following Thanksgiving, did anything unusual happen with reference to either one of these two men?

A Yes. Boudoin was in the hospital. He was laid up and in the hospital, and the next morning after this happened the Captain told Gonzales he couldn't go ashore any more, he was restricted to the ship, and the next morning about, I would say, around about nine-thirty or a quarter to ten I saw Gonzales go down to the dock to go ashore, and the Captain and myself told him "Come on back on the ship, you are restricted to the ship," and he kept on going, and so when he came back to the ship that afternoon around one o'clock or one fifteen o'clock, the Captain told me to go get him and bring him up and put him in irons, put handcuffs on him and put him in the locker on the after part of the bridge deck, and we kept him there until that night about midnight. Well, in the meantime when he went ashore, Gonzales was drinking when he went ashore, and when he came back on the ship we locked him up in irons to keep him from roaming around the ship any more and getting in any other arguments all night down there. He staved in irons

that day until about ten or eleven o'clock, and we turned him loose, and after that he went down to his room and we never had any trouble with him at all after that on the whole voyage.

Q Did Boudoin perform any duties on the ship after his difficulty with Gonzales?

A On the way home?

Q Yes.

A No, he laid in the hospital all the way home.

Q Did this doctor remain with the ship?

A He made the passage back from Walvis to New Orleans, yes. And I remember when we hit New Orleans here and paid off, the Captain fired Gonzales.

Q I was going to ask you about that. Did anything happen when the voyage terminated with reference to these two men we have been talking about?

A It did. The Captain fired Gonzales, and then they came, the Union came down and tried to get the Captain to take Gonzales back on the ship, but the Captain wouldn't do it and stood up on his rights of firing the man and the man stood fired. Naturally at that time Boudoin still had bandages on his head and went off the ship to the hospital or to the doctor, or wherever he went, and I understand by the Union and Boudoin there, they brought Boudoin up on charges.

MR. KIERR:

I object to hearsay testimony, especially as injected by this witness and in view of the fact that it seems to be

a gratuitous statement coming from the witness.

MR. WRIGHT:

Q Let me ask you this, then? Did you hear the union's,- Let me finish the question.

Did you hear the Union's representatives state on board the vessel that they were bringing charges against Boudoin or was that something you heard from some other source?

MR. KIERR:

I object to any question seeking to elicit hearsay testimony from this witness.

A Yes, I heard it from members of the crew, but I do know for a fact I was in the Captain's room when we were paying off, about the union trying to get Gonzales to stay on the ship.

Q To stay on the vessel?

A That's right.

MR. KIERR:

Mr. Wright, it seems you are endeavoring to encourage the witness to give hearsay statements. May I ask you to admonish him not to tell what anybody else told him, but only what he knows of his own knowledge?

MR. WRIGHT:

Your appreciation of the law is inaccurate. My opinion is that if this witness heard a union representative, in the presence of the plaintiff in this case, state that they wished Gonzales to remain aboard the vessel, that is admissible evidence as a statement of fact which was made by a union representative. Furthermore, all objections except

as to the form of questions are reserved to be urged at the time of trial, at which time the judge will rule on this difference of opinion between you and me.

You may examine the witness.

CROSS EXAMINATION

MR. KIERR:

Q You are the Chief Officer of the SS Mason Lykes?

A I am.

Q And you were such -

A I beg your pardon?

Q And you were so employed during November of 1949?

A I was.

Q You were aboard when -

A When I was born?

Q You were aboard -

A Oh.

Q - when the Oiler, E. J. Boudoin, was injured?

A I was.

Q How was he injured?

A He was struck on the head with a bottle, so he said. I didn't witness the injury.

Q Do you know who handled the bottle?

A I do not know but what I heard. I didn't witness the accident, but I heard Gonzales was the one did it.

Q Who is Gonzales?

A Gonzales was a Deck Maintenance on board the ship.

Q Do you know him?

A I know him, yes.

Q Did he admit he had done it?

A I think he did.

Q To you?

A No.

Q Did he admit to you he had done it?

A He never did come out and tell me he did it, no, sir.

Q Did he deny it to you?

A He never made a statement to me that he had done it. I never did request it.

MR. KIERR:

What is so funny, Mr. Wright? I know you are laughing. Has that any significance? Understand, Mr. Staggers, this is a serious matter.

A That's right.

Q Notwithstanding Mr. Wright's audible laughter.

A No, I don't care anything about that.

MR. WRIGHT:

Does this mean that every time we laugh at a deposition it will be recorded? The last one we took, yesterday, you were laughing most of the time, Mr. Kierr; the one we took yesterday afternoon. The reason why I smiled was because there is no dispute in this case as to the fact that this man, Gonzales, was injured in a closed room, and that this man didn't witness it, and you are now trying to elicit hearsay information, which is the same thing you were objecting to a while ago. It seemed funny that you should be doing what you objected to my doing.

MR. KIERR:

Q Is there any doubt in your mind that Gonzales struck Boudoin with a bottle?

A No, there is no doubt in my mind.

Q Did you make an investigation aboard the vessel with regard to these incidents?

A I made an investigation. When Boudoin came up to me I took him to the hospital.

Q As Chief Officer, isn't that your duty to investigate matters of that sort?

A In a sense, yes.

Q Do you not make entries in the official log of the vessel concerning them?

A You do, you do.

Q Do you approve entries in the official log?

A I do.

Q Did you make any statements concerning this matter?

A I have.

Q Have you reviewed them to refresh your recollection?

A I have them.

MR. KIERR:

May I have them?

MR. WRIGHT:

You say them. The only one that I know of is the one that the witness made out aboard the ship. This is a copy of it. He may have also signed the official log, and of course I know you have a copy of the official log since it is available in the Customs House.

Q I don't believe you reviewed the log today, did you?

A Did I review the log today?

Q Did you look at the log to refresh your recollection?

A No sir, the log is turned in to the company. I haven't the log book.

Q The official log?

A The rough log and official log book, which is the official log book, is turned in to the Coast Guard. The rough log is with the company. Some ships keep a smooth log, a rough and a smooth log.

Q I am trying to find out whether you refreshed your recollection from any documents other than this statement.

A The only thing I saw was the statement; I didn't review the log book on it.

MR. KIERR:

Q Where did this event take place aboard the vessel?

A That I don't know. It is supposed to have taken place in the crew's quarters.

Q You didn't investigate it?

A I investigated, but when Boudoin came to me I was more particular about getting Boudoin fixed up, and not investigating what happened. I think it took place in Boudoin's room.

Q Did you go in his room?

A I went in his room.

Q Was there blood there?

A Yes, there was blood on the deck.

Q Were there pieces of broken glass there?

A Broken glass was there, yes sir.

Q Is there any doubt in your mind that the event took place in Boudoin's room?

MR. WRIGHT:

I object to the form of the question.

MR. KIERR:

Q Is there?

A That I can't say, for this reason: It may have taken place outside in the alleyway; it may have taken place in the room; I didn't witness the accident; I was in bed asleep when the accident happened.

Q As the one in charge of investigating, didn't you endeavor to find out where that had taken place?

A At the time I was more interested in getting Boudoin's head fixed up, and then I was going to make the investigation after.

Q I am not confining myself to what investigation you made immediately upon the occurrence of the incident, but any subsequent investigation you may have made.

A I made an investigation of where it taken place, and it seemed like it could have taken place in Boudoin's room or it could have happened outside and the glass fell in the room. I don't know whether it took place in the alleyway or in his room.

Q When you say it could have happened in the alleyway and the glass thrown in his room, do you mean to tell me that according to your investigation, the facts you developed revealed that this event could have taken place in the

alleyway?

A He could have been sticking his head out of the door and the man could have struck him in the head from the door and the glass could have broken and fell in his room.

Q Did you put that in your report?

A No. I don't know.

Q Was that the conclusion you reached from your investigation?

A It could have been. That I don't remember, all I put in the log book. In fact that Captain wrote the entries in the log book.

Q Did you approve of it?

A I approved it after he wrote it.

Q Did you read it?

A Yes, I read it.

Q Did you help prepare it?

A Yes sir, I helped prepare it.

Q How can you tell me it could have happened in the alleyway? Is it because you don't remember thinking it happened in the room or in the alleyway?

A I didn't exactly know what entry I made in the log book, whether we said it happened in his room or in the alleyway. Really I don't remember.

Q Isn't that a pretty important fact, Mr. Staggers?

A Yes, but do you realize that is something happened three and a half years ago, three years ago, or two and a half to three years ago, and I am on the ship and make several voyages, and when you take something like that I don't impress

my mind on it unless I have the log book to go back on it.

Q Do you have a private room aboard the vessel?

A I have.

Q Does anyone who doesn't share that room have the right to go in there without your permission?

A They haven't.

Q Does that go for unlicensed crew also?

A In a way. The unlicensed crew share with another man, two in a room.

Q Who was the man sharing Boudoin's room?

A Fireman Water Tender.

Q Two fireman water tenders?

A One fireman water tender. I said one other man.

Q Do you know his name?

A No, I don't.

Q If I told it to you, would you know it?

A No, I wouldn't say.

Q Could it have been a man named Brown?

A I haven't the faintest recollection.

Q But you do know that Boudoin shared his room with another member of the Engine Department?

A That's right.

Q Two men to that room.

A That's right.

Q Not three.

A That's right.

Q Now, were those two men, Boudoin and his roommate, entitled to the same privacy as you were entitled to yourself

A That's right.

Q Does that mean that nobody is supposed to walk in there without their permission?

A That's correct.

Q Isn't a man's forecastle aboard a ship regarded as his home?

A It is.

Q Is it not a tradition of the sea that a man is entitled to defend his forecastle as a man is entitled to defend his home?

A It is a tradition of the sea.

Q Was or was not that the policy aboard this vessel?

A No.

Q What was the policy aboard the vessel?

A Policy? Do you mean aboard the vessel? You are talking about the policy aboard the vessel, they will go in anybody's room. It is a tradition of the sea, he is not supposed to go in anybody's room unless you ask him, but they go in each other's room any time they feel like it.

Q And that was done to your knowledge?

A Some times I have known if a man wanted to go in another man's room down there without the man inviting him, sure that was sometimes done without my knowledge. I am not supposed to be the guardian of the men down there and tell them they have to get permission from me to go in a man's room.

Q Do you mean that the policy aboard your vessel was much more lax -

A No, no.

Q What do you mean to say, then?

A I mean to say if you come knock on the door and there's somebody in the room, they will say "Come in", and sometimes you knock on the door and don't get any answer, and there's nobody there, and you open the door anyway and come in. I am not down in the forecastle every twenty-four hours a day, and I can't spend all my time down in forecastle rooms telling men not to go in that man's room.

Q Was it or was not it proper for one crew member to go in another crew member's room for the purpose of stealing?

A For the purpose of stealing it is not proper, no.

Q How about taking something without permission?

A Taking something without permission isn't proper.

Q Do you know why Gonzales went in Boudoin's room?

A I do not.

MR. WRIGHT:

I object to the form of the question.

MR. KIERR:

Q You don't have any idea why he went in there?

MR. WRIGHT:

Same objection.

A No idea.

MR. KIERR:

Q You didn't find out?

A I don't know whether Gonzales went in Boudoin's room or not; I don't know; I never did witness that; I never asked him if he went in the room or not.

Q Do you mean as Chief Officer, and the one in charge of the investigation of this matter to inquire into it, you didn't find out first of all whether Gonzales went into Boudoin's room, and secondly, why he went in if he did?

A Ask that question again, please, now?

Q As investigating officer aboard the vessel -

MR. WRIGHT:

I object to the form of the question.

MR. KIERR:

Q As Chief Officer, did you or did you not investigate these happenings?

A I investigated the happenings after we gave Boudoin treatment there.

Q And afterwards, did you find out whether or not Gonzales went into Boudoin's room?

A I don't remember. Read my statement.

Q You don't remember?

A I don't remember whether he went in Boudoin's room or not. Like I told you, I don't know whether the assault took place in his room or not, or whereabouts. If I witnessed the accident I might know. I don't know if you realize it, but I investigated after the accident took place, and I don't remember whether Gonzales went in Boudoin's room or not.

Q Did you ask Gonzales?

A Ask him what?

Q Whether he went in Boudoin's room?

A I don't remember.

Q Did you ask Gonzales to make a statement?

A I think Gonzales made a statement, or I think he refused to make a statement, one or the other; I don't remember exactly what it was.

Q If he made a statement, what was it?

A I say I don't know whether he refused to make a statement or made a statement or not. I don't remember.

Q Did he sign it?

A I don't know whether he made a statement or not; that's what I am saying.

Q Why can't you remember?

A Because I don't remember, that's why.

Q Because it happened so long ago?

A It happened so long ago.

Q I show you a photostat which purports to bear your signature. Do you recognize that as a faithful reproduction of your signature?

A That's right.

Q What document is it?

A I would say that is a statement that was made. I don't remember whether he made a statement or not.

Q Did you sign as Chief Mate, and a witness to the fact that Gonzales refused to sign a statement?

A I signed the statement there. I signed that statement there.

Q Was the answer to my question yes?

A Yes.

MR. WRIGHT:

I submit we are being somewhat repetitious. The witness already testified he signed the official log, and the official log contains all that information, including the fact that Gonzales refused to sign the statement.

MR. KIERR:

Q You put Gonzales in irons?

A The Captain and myself did it, yes.

Q Did you have to restrain him to do it?

A No.

Q Was he peaceable about it?

A Very much so.

Q Have you handled drunks before

A Several times.

Q Did he handle as easily as the average drunk?

A Just like docile putty. When he came aboard I went right over and took him right by the hand and led him to the room, and after that to the bridge deck.

Q Was he too drunk to resist?

A He wasn't too drunk to resist, no.

Q How drunk was he?

A I couldn't say that; I didn't take any tests to show drunkenness; I don't know how drunk he was; I don't know how drunk the man was.

Q He was drunk enough to be docile, and not fight you when you put him in irons?

A He didn't attempt to fight me.

Q Was he sober when you put him in irons?

A No, he wasn't sober; he was drinking. I don't know whether he was drunk or not; I am no medical man to tell how drunk he was, but I know the man was drinking.

Q When you say drinking, that includes a man who is very drunk?

A I don't know if he was very drunk; he was drinking. He was drinking; I don't know the man's capacity for drinking.

Q You indicated that Gonzales was drunk the night of the assault.

A I didn't see Gonzales before the assault.

Q I don't know if you know what --

A He seemed to be drinking. He was drinking.

Q Did he appear to be drinking just a little bit, a great deal, or just an intermediate amount?

A I don't know what you would call a little bit, a great deal or an intermediate amount, or what the man's capacity is. Every man has a different capacity for drinking, a great deal, or a little bit, or a different amount. I don't know how much he drank.

Q You decline to qualify for me whether the man was drunk, therefore you oblige me to break it down to try to get a definition. Let's start at this: Would you say that Gonzales was under the influence of liquor?

A Well, to me under the influence of liquor would be the same as if I said he was drunk. He was drinking. I never did associate with the man, never did go ashore with him when he was drinking, so I couldn't tell you. One man might take a drink and react like he was drunk as a hoot-owl.

I don't know how drunk he was.

Q How do you know he had been drinking?

A Because I could smell alcohol on his breath.

Q How did he act?

A Do you mean after the accident?

Q Yes.

A Well, he was outside in the alleyway, and seemed to be worrying, standing there outside the hospital door and seemed to be worrying about it, that's all.

Q You said that in your original testimony. Do you mean to convey that he was a peaceable citizen who seemed to be genuinely worried about Boudoin's injury?

A Well, yes, he was peaceable at the time.

Q At times?

A At that time, I said, while he was standing outside in the hallway. He didn't try to create any rumpus.

Q How about any time thereafter?

A The day he went ashore, there wasn't any rumpus there. The Captain gave him orders not to go ashore, and he went ashore without the Captain giving him permission, and when he came aboard we met him at the gangway and brought him up there, and there wasn't any trouble to it.

Q As a matter of fact, Mr. Staggers, didn't they have to take a knife away from Gonzales after the attack on Boudoin?

A Not to my knowledge.

Q Don't you know that the Third Mate, Harry Brock, had to take a knife away from him?

A Not to my knowledge, no sir --

Q Is Mr. Brock still aboard the vessel?

A No sir.

Q Do you know Mr. Brock?

A Yes, I know him.

Q Wasn't Mr. Brock the Mate on watch when this happened?

A Yes, he was Third Mate.

Q Didn't you report this incident to him?

A No.

Q Do you remember signing the original of that statement made aboard the vessel?

A This statement? I made it, yes.

Q Did you read everything that was on the page when you made that statement?

A I read the statement over that I signed.

Q Tell me whether or not this is a photo-copy of the document bearing your signature.

A It is, it is.

Q Would you please refresh your recollection by reading the paragraphs at the top of that page concerning the fact or facts that you told Mr. Brock, that there had been an assault on Mr. Boudoin.

MR. WRIGHT:

You are referring, Mr. Kierr, to the statement of Mr. Brock? Is that what you want the witness to read?

MR. KIERR:

I certainly am.

MR. WRIGHT:

I have no objection to the witness' reading the statement

of Mr. Brock; however, we certainly reserve our right to object at the time of the trial.

MR. KIERR:

Q Would you please read those two paragraphs I referred to at the top of the page?

A Yes, sir. "At about 1:45 A.M. on the morning of November 25, 1940, I was on watch on bridge when Chief Mate, Mr. C. Staggers called me and told me there had been an assault on E. J. Boudoin. On my going below saw Boudoin standing in shower room and his head and shoulders covered with blood. Mr. Staggers told me to call Dr. Seaman, a passenger. I did so and he immediately came below and placed Boudoin in the hospital where, with the assistance of Captain Townsend and Mr. Staggers, he dressed and sewed up Boudoin's injuries."

I don't remember telling Brock that. I remember he was on watch, but I was in my bed asleep, but I didn't witness the accident. I can't remember telling Brock that. Do you want me to read this?

"On going into the crew's mess, I met M. Gonzales coming out with a large knife in his hand. A. Brown, FWT and J. Pali, Dk Main. came out of the Boatswain's room and we got the knife away from Gonazles. He then went around by the hospital where the doctor was dressing Boudoin's injuries. Gonzales stated that he was responsible for the injury to Boudoin in the presence of all persons there."

Q By whom is that signed?

A Signed, Harry F.Brock.

Q Do you recognize his signature?

A Yes.

Q Was that statement --

A Made by Mr. Brock.

Q - On November 25, 1949, in the course of ship's business?

A By Mr. Brock, yes.

Q And your statement is immediately below his?

A But my statement wasn't made on the same paper; I mean, both statements wasn't made together.

Q Then you were wrong when you said they weren't made on the same paper?

A It is different statements, made at different times.

Q Weren't they on the same sheet of paper?

A On that paper, yes.

Q Isn't that a faithful photoreproduction of the paper?

A Of my statement and Mr. Brock's statement, yes.

Q Did you find out about the knife incident in your investigation?

A I don't remember anything about a knife at all.

Q You wouldn't say that Mr. Gonzales wasn't carrying a knife after the assault on Boudoin, would you?

A I can't say he wasn't either. I never did see Gonzales. The first time I noticed Gonzales was outside in the alleyway of the hospital.

Q Was he giving trouble then or not?

A No, he wasn't giving trouble.

Q How would you describe his actions then?

A Standing out there trying to get in the hospital.

Q For what purpose?

A He said he wanted to give Boudoin blood transfusions if he needed it.

Q Did you permit him in the hospital?

A No, he didn't come in the hospital.

Q Why not?

A Because we didn't allow it. Captain Townsend was in there dressing the man's head.

Q Who told Gonzales he couldn't go in the hospital?

A I did. I think the Captain and myself did.

Q How many times did you have to tell him that?

A I don't remember.

Q More than once?

A More than once.

Q You didn't have to make any strong statement to him about keeping out of the hospital?

A Not to my recollection, no sir.

Q Do you want us to have the impression that Gonzales, from your testimony, was a nice, peaceable citizen who didn't give any trouble aboard that ship?

A Gonzales never gave me any trouble before that time.

Q How about after that?

A After that time there never was any trouble with the exception of that time he went ashore. That's the only time he ever gave trouble all the way home. He never gave us any trouble.

Q And you explain his being put in irons simply because he went ashore without permission?

A That's right, when he was told not to go ashore. He was strictly told not to go ashore any more. He was restricted to the ship.

Q So you put him in irons?

A When he came back aboard the ship.

Q And nothing else had to do with his being put in irons?

A When he went ashore he drank some more, one reason, and if I remember correctly we took a bottle of whisky off him when he came up the gangway.

Q Was he so drunk you had to put him in irons when he came back?

A No, he wasn't that drunk he had to be put in irons, but when the man disobeyed orders when he was told not to go ashore, that is the reason he was put in irons. He did have a bottle with him when he came back to the ship and we met him at the gangway and took the bottle away from him and I threw it over the side.

Q Have you had seamen go ashore without permission before?

A Plenty times.

Q And how many times have you put them in irons on occasions like that?

A I never did put him in irons.

Q What you mean to say is this is the first time?

A This is the first occasion I remember.

Q The first occasion for putting him in irons.

A Yes sir.

Q -- for going ashore without permission.

A Yes sir.

Q What made this occasion so different?

A When you remember he had assaulted Boudoin that night, and figured he came and went ashore that morning and came back where we didn't know what he was going to do, -

Q You didn't want him to assault anybody else?

A Not only assault anybody else; he never had any intention of assaulting anybody else, probably, and went ashore and drank more than he should have drunk and would have probably came back and went down in his room and went to sleep, but the Captain told me to put him in irons when he came back aboard the ship.

Q Have you ever seen seamen aboard ship who had too much to drink?

A Well, yes, I have seen them before.

Q In fact, that is a frequent occurrence, isn't it?

A Not very frequent, sir, not a frequent occurrence. It occurs quite often, but not frequently, no sir.

Q Have you ever put a seaman in irons before because he had had too much to drink?

A Yes, I have.

Q When was the last time?

A I can remember on, -- No, in 1945 I can remember. I think there were several times.

Q That you put drunk seamen in irons?

A When they came back boisterous, yes.

Gonzales' admitting he hit Boudoin?

A According to this statement, yes.

Q That is your signature at the bottom?

A Yes.

Q This refreshes your memory, then, doesn't it?

A Yes, this is the official log.

Q And is it not stated there that after Gonzales was threatened with being put in irons if he didn't leave the hospital and turn in, and he then went to the boatswain's room?

A "After I threatened to place Gonzales in irons if he didn't leave the hospital and turn in, he went to the boatswain's room." That is the Captain's statement.

Q And said what?

A "To the boatswain's room and told him he had killed a man. This was told me later by Boatswain Oswald."

Q That is in the official log, signed by you?

A I was a witness to the official log, yes.

Q And the final entry for that time, 8:30 a. m. on that date, declares that statements are to be taken from all witnesses and attached to the log?

A And from non-witnesses, negative statements to be attached to the log. The witnesses to the accident.

Q And that was your duty, wasn't it?

A What, to take statements?

Q And see that the Captain's orders for taking such witnesses' statements, or non-witnesses' statements, were carried out?

Q Do you mean to tell us he got boisterous?

A No, no. They would make threats, boisterous, making noise, wouldn't go to bed, wouldn't turn in.

Q Is that what this man was doing?

A No, he just walked down the gangway and went ashore without permission, and when the man come up the gangway and came on deck. The Captain and myself took the man when he came aboard, met him right at the gangway, when he went ashore before when he was strictly told he couldn't go ashore.

Q You want us to believe, then, that the only reason you put him in irons was because he had gone ashore without permission and came back after taking some drinks, although he wasn't boisterous?

A Well, he went -- he had a bottle of whisky with him when he came back.

Q And for that reason and no other, you put him in irons?

A That's right.

Q It had nothing to do with protecting the members of the crew from assault by that man?

A That's correct, that's correct.

Q Do you know whether or not he failed to obey any other orders aboard the vessel?

A Not to my knowledge.

Q Who was ordered to clean up the ship's hospital after Boudoin was administered to there?

A Who was what?

Q Who was ordered to clean up the ship's hospital after

Q You approved it as Chief Officer.

A I approved it as Chief Officer, yes. This is the Master's statement here in the log book. I am a witness to the statement, that's all.

Q Can you or can you not tell me for what reason Mr. Gonzales is to be required to pay for overtime expended because of Boudoin's being laid up?

A Well, because he was - the statement, or statements here says he was the one hit the man causing the man to be laid up. That's what the statement says up here at the top, doesn't it?

A It seems to me, Mr. Staggers, that whenever you get to a fact that doesn't seem to help the ship, you don't remember, or you don't know.

MR. WRIGHT:

I object to the form of the statement of Mr. Kierr.

MR. KIERR:

Q Let's be candid with each other, Mr. Staggers.

A You have these statements, photostatic copies, I haven't got them. If I had read them over to refresh my memory, these statements, if I had had the official log to refresh my memory - You realize I have been on several ships since this ship, and I can't remember all the business that happened on every ship I have been on.

MR. WRIGHT:

In other words, the witness is saying that this log book contains a statement which was made out by the Master, which he has told you several times, and all he reviewed

Boudoin was treated there?

A I don't remember that.

Q Could it have been Gonzales?

A I don't remember.

Q As a matter of fact, wasn't it Gonzales who was told to clean it up?

A I say I don't remember whether it was or not. I don't remember that, whether Gonzales cleaned the hospital up or not.

Q As a matter of fact, wasn't a log entry made that Gonzales failed to obey an order to clean up the ship's hospital?

A Not that I know of.

Q How much liquor did he have when he came aboard?

A How much? Oh, he had a bottle; I don't know what was in it.

Q Was it one bottle or several bottles?

A One bottle.

Q Are you sure of that?

A I took the bottle off him myself and threw it over the side.

Q One bottle?

A One bottle.

Q As a matter of fact, didn't he have several?

A One bottle was all I threw away.

MR. WRIGHT:

Let him finish his answers please.

MR. KERR:

Q Was any report made to the police of Walvis Bay regarding Gonzales?

A I don't remember.

Q As a matter of fact, weren't the police there requested to take him into custody?

A I tell you I don't remember that. I don't remember whether I was on -- I don't remember whether we made it down there or not.

Q Didn't the police refuse to take him into custody unless the Captain would leave him behind in Walvis Bay?

A Did the police what?

Q Did not the police insist that if they would take him into custody the man would have to be left behind in Walvis Bay?

A I don't remember.

Q There seems to be a great deal about this matter that you don't remember, Mr. Staggers.

A I suppose so. That happened several years ago. I can't recall everything that has taken place on the ship several years ago like that. I have no occasion to remember all that.

Q And if Gonzales was a known dangerous character, you don't remember that?

A As far as I know he wasn't a known dangerous character, because he was on the ship before this happened and after it happened, and I know Gonzales did his work, and I never had any more trouble with Gonzales before or after this

happened except the day he went ashore.

Q And possibly you had cause to know it?

A I would know about it, yes.

Q And if you did know about it, then you have forgotten it as of now?

A I wouldn't say that.

Q Would you recognize Gonzales if you saw him?

A I think I would.

Q Would you recognize a picture of him?

A I think I would.

Q What did you estimate he weighed?

A I would say he weighed between 150 and 160 pounds.

Q About how old a man was he?

A I think he was a young age, around 28, 25, 24 years old.

Q I show you what purports to be a photograph of a man.

A That is Gonzales.

Q That is Gonzales?

A That is Gonzales, yes.

Q Would you inspect that clipping closely? What age is shown there?

A I said a man about twenty-five years old.

Q Would you read it and see what age is given? Suppose you read that clipping to us.

A He was about twenty-six years old, Gonzales.

Q Read the beginning.

A Forty year old upholsterer -

MR. WRIGHT:

What are you going to try to do? Establish information through the witness' reading from a document not involved here?

A I said the man was twenty-six years old. That's just what he looked to me.

MR. KIERR:

Strike those questions out, Mr. Wright is right.

MR. WRIGHT:

You confronted the witness with a document and I should appreciate your giving me an opportunity to read it before we continue any further.

MR. KIERR:

I think it would well serve for your edification that you read the document. Proceed.

MR. WRIGHT:

I have no objection to the witness' reading the document into the record subject to the reservation of our right to object at the time of the trial.

MR. KIERR:

Q That document is a press release dated March 6, 1950, is it not?

A It is.

Q And it shows that Manuel Gonzales, whose picture appears thereon -

MR. WRIGHT:

It is understood that all objections pertaining to everything, with the exception of the form of questions, is

reserved to the time of trial.

MR. KIERR:

Q - was booked with aggravated battery.

MR. WRIGHT:

Let's not pick out parts of the document. If you are going to refer to the document, let the witness read the whole thing, and if the court rules it is admissible it will go in, and let's not take parts of it. Give the jury the whole story.

MR. KIERR:

Q -- for cutting a man with a knife, was he not?

MR. WRIGHT:

I instruct the witness not to answer the question unless you will admit the whole document and the picture, and not just pick out parts of it. If you only want to use parts of it I will instruct the witness not to answer questions pertaining to a newspaper clipping. If you want the whole clipping to go in appended to the deposition I will be happy to let the court rule on it, but I am not going to let the witness answer a lot of questions about a newspaper clipping.

MR. KIERR:

Q Does this now refresh your recollection that Gonzales was a bad actor?

A Not aboard the ship. I never knew of any trouble aboard the ship until that night.

Q What trouble did he cause that night?

A When they claim he hit Boudoin with a bottle.

Q When did he claim that he did that?

A The night in question.

Q Where were you and where was he when he claimed that?

A I was in my room asleep,

Q And where and when did Gonzales make that statement to you?

A Gonzales? I said when it was claimed he hit Boudoin with the bottle. Gonzales never made that statement that he hit Boudoin. Boudoin told me himself Gonzales hit him with the bottle; that's when I made that statement.

Q Is this a photoreproduction of the log entries, including your signature thereto?

A It is, yes. Yes, it is.

Q Those log entries pertain to what ship, place and time?

A It is at Walvis Bay, November 25, 1949.

Q SS Mason Lykes?

A SS Mason Lykes, yes. These entries here is the official log.

Q Is it or is it not stated therein that during care of Boudoin the Deck Maintenance Manuel Gonzales admitted he hit Boudoin? And that he requested permission to sit by him and watch him during the night? This statement was witnessed by several members of the crew, and one of them is Chief Officer Staggers, Third Mate Brock --

A Third Assistant Engineer, Williamson.

Q Is that or is that not correct?

A That is correct, yes.

Q In other words, you, as Chief Officer then did witness

A I think we made out a negative statement form.

Q In other words, these statements were taken in the course of ship's business, were they not?

MR. WRIGHT:

I object to the form of the question.

A If any statement was taken, yes.

MR. KIERR:

Q Was any taken?

A I don't remember exactly if those statements were taken from those witnesses.

Q What is the next entry?

A "About 9:30 a. m. sent M. Gonzales, Deck Maintenance, to clean ship's hospital. Failed to obey orders and left ship during working hours. On return, he to be logged the sum of two days' pay, and to pay all necessary overtime when Boudoin is relieved from duty."

Q You approved that entry in the official log, didn't you?

A I was a witness to it, yes.

Q Would you tell me why it was then decided that Gonzales was to pay all overtime necessary while Boudoin was relieved from duty?

A Remember the statement that Gonzales had made, that he was the cause of the man being laid up -

Q I am interested in your testimony.

A The Master made this statement years ago, in the official log book.

Q Haven't you just now hit the nail on the head?

A What's that?

Q Isn't it that Gonzales was absolutely the cause of Mr. Boudoin's being laid up?

A Because of this statement, according to this statement. I said I didn't know whether Gonzales hit Boudoin or not, but according to the official log he did, but my statement, I don't know, I didn't see the man hit him. I didn't see him hit him.

Q Your testimony this evening seems to defend Gonzales.

A In a way, like this, yes, because the man never caused any trouble on the ship at all. I never defended Gonzales. I had my own personal opinions, but Gonzales never told me he hit the man with the bottle. He might have made that statement when I was standing outside the office and I didn't hear it, but he never told me personally he hit that man with the bottle, although he must have made some statement to that effect because you had the statement made by Captain Townsend that Gonzales said he hit the man with the bottle.

Q This wasn't an accident, was it?

A I am sure it wasn't.

Q Therefore someone is at fault, someone is to blame?

A I suppose so.

Q Who is to blame? Boudoin or Gonzales?

A I don't know. I don't know when the argument came up, whether any argument was involved in the assault or not. I don't know the circumstances of the case, and I wasn't

aware it happened until after it happened. In other words I wasn't down there when it happened and never did hear these two men argue before on the ship about anything, and I don't know when he hit the man with the bottle, and I don't know whether the two of them had an argument or not.

Q Do you defend Gonzales or blame him?

A I am not defending Gonzales a bit, just giving you a statement of what I know about the case.

Q Do you blame Gonzales or not?

A I don't know whether to blame him or not; I don't know enough of the circumstances; and I don't know what was involved in it, whether they had an argument.

Q When you signed the log entry, did you not approve the decision to charge Gonzales with overtime to be paid while Boudoin was laid up?

A I signed the entry in the log book. I signed it as a witness, yes.

Q You didn't approve it?

A The Captain approves the log, and I witness him signing it.

Q In other words, your signature -

A Is a witness to the Captain's.

Q And is it your testimony now that you do not approve the decision to log Gonzales for what was to be paid because,

A No, no.

Q - because of Boudoin's disability?

A It is not my decision at all.

Q Do you disagree with such decision?

before testifying was his own statement which we have given to you and which you haven't bothered to read. You have been asking questions from the log entries.

MR. KIERR:

Mr. Wright, you handed to me what purported to be a conformed copy of Mr. Staggers' statement. I have interrogated him with regard to a photostatic copy of the original, and you are slightly in error in saying I have not bothered to read Mr. Staggers' statement.

MR. WRIGHT:

Do you mean you had it before you asked me for it?

MR. KIERR:

I asked for all the statements the man made.

Q Mr. Staggers, you didn't request the opportunity to read the log entries before testifying?

A This?

Q Yes.

A I didn't.

Q Were they offered to you?

A They were not.

Q Do you know whether the log book is in this office?

A I do not.

Q If it isn't here it ought to be in Lykes' office?

A If I am not mistaken, this is a copy of the official log, isn't it?

Q Do you recognize it as such, with your signature?

A That's what it says, official log book.

Q Is that or is it not?

A It is here, it says copy of official log to be given to the man Gonzales. That is the official log book. There's a difference between an official log book and a rough log book.

Q The only purpose I want this document to serve, Mr. Staggers, is to try to refresh your memory. I would like it to act as a crutch to your recollection. Read the document and see if it refreshes your memory.

A This is my signature on Captain's Townsend's statement in the log book.

Q Would you have signed it if you hadn't read it?

A No, I wouldn't have signed it if I hadn't read it.

Q And at the time you signed it you thought it was correct?

A Evidently it is correct. My statement had nothing to do with this at all; this is Captain Townsend's statement.

Q Can you tell me what authority a ship's master has to make an assailant pay overtime expended because of another man's absence from work?

A I don't know.

Q I thought you had a Master's papers.

A I have.

Q Would you say Captain Townsend was exceeding his authority as a ship's Master?

A I don't think he was, but I don't know what branch of the law he goes by to force the man to pay overtime covering this man's work when he was laid up, unless the man was absolutely guilty in the accident and he was the cause of it.

A No, I do not.

Q This next entry of the same date states that about one p. m. -

A That's right; that's when Gonzales came aboard ship.

Q Gonzales returned aboard with bottles of liquor.

A I only know of one bottle of liquor.

Q Would you say when you signed that log entry the use of the word bottles in the log entry was a typographical error which you didn't notice?

A It says the liquor was confiscated and thrown overboard; it don't say whether one bottle or what, it says confiscated and thrown overboard. He only had one bottle, like I stated, with him.

Q Notwithstanding the fact that the official log says more than one bottle, you have a definite, positive recollection there was only one bottle?

A That's all I remember taking off Gonzales was one bottle, and I threw it over the side.

Q If there was more than one bottle, you don't know anything about that?

A I didn't see it.

Q Or you have forgotten?

A I didn't see it.

Q Or you have forgotten it?

A No, no, all I seen was one bottle, and took the one bottle myself and threw it over the side right there by the gangway.

Q And then it is noted here that Gonzales was placed in irons, from the log.

A To place him in safe-keeping.

Q Would you read the entry?

A "At about one p. m., -

Q About the irons.

A "Placed Gonzales in irons awaiting arrival of police to place him in safekeeping."

Q Now, does that refresh your memory as to the reason why Gonzales was placed in irons?

A Well, as far as I remember that, Gonzales when he came aboard the ship didn't try to cause any trouble, when he came aboard that afternoon.

Q Mr. Staggers, wasn't Gonzales placed in irons in order to restrain him, to keep him under restraint until the police authorities from shore could come and take him and incarcerate him? Isn't that a fact?

A According to the entry in the log book, yes.

Q Does this refresh your recollection as to what happened?

A I distinctly remember Gonzales when he came aboard the ship, came up the gangway and I met him at the top of the gangway, and he walked with us to the bridge deck and didn't say boo. We put him right there and locked him up and put the irons on him and locked him up. That is my recollection of what Gonzales did when he came back aboard the ship.

Q Was it then, that you put him in irons not because he was ferocious when he came aboard the ship, but because he had been ferocious in his attack upon Boudoin?

A I couldn't say so; I don't know.

Q Mr. Staggers, do you now remember that the shore police authorities were requested to intercede in this matter?

A Since reading that, yes.

Q Will you tell me now everything you remember about the police authorities?

A I remember they were there, and it says here all I remember since reading it. That is all I can remember about the police coming aboard the ship.

Q Did you speak to the police?

A I don't remember speaking to the police.

Q If you did, you have forgotten about it?

A That's right.

Q Do you know whether the police took Gonzales?

A No, he wasn't removed from the ship.

Q Do you know why they didn't take him?

A I don't know why they didn't take him; he wasn't relieved from the ship. He wasn't removed from the ship, I know that.

Q Do you know why the police were requested to take him into custody?

A Why they refused to take him?

Q The reason why they were requested to take him.

A The statement Captain Townsend made there is all I know.

Q Why was that?

A Well, read it, it is in black and white down there.

Q Were the police requested to arrest the man because he had gone ashore without permission?

A According to that report --

Q Was it because he had been drinking?

A According to the statement, it is there on the statement. Read the statement. The statement says Captain Townsend requested the police.

Q Was it because he had been drinking?

A One way, yes.

Q And what other way?

A Because he was drinking, because he went ashore without permission is another way.

Q Have you ever in your position as Chief Officer requested shore police in a foreign land to arrest a member of a crew, to be held ashore with the police because he had been drinking?

A Not to my recollection.

Q Now, would you read the next sentence? No, no. Strike that out. Would you define for me what is meant by the police placing him safekeeping?

A What? Define?

MR. WRIGHT:

You are asking him to define words used by the Master? Are you asking this man to tell you in the Master's log entry what the Master had in mind? How long are we going to go on with this?

A That is the Master's statement, not mine. The Master made that statement in the log book, and he might have different ideas of putting a man in safekeeping than my ideas are.

Q Do you mean this is the Master's statement, and that the only reason you signed it was to act as a witness to the Master's signature?

A That is all the Master's statement;that is the Master's entries in the log book.

Q You didn't approve it?

A As a witness, and I read the statement after the Master made it.

Q And didn't you approve of it as Chief Officer?

A I am Chief Officer. I had to sign as a witness to his entry in the log book, yes.

Q How many times did you sign it?

A I don't remember how many times I signed it. I signed the official log book one time, and I don't remember whether that is the only time I signed the statement.

Q You have looked at this document several times in the last ten or fifteen minutes. How many times is your signature on it, sir?

A I don't remember. I think it is two times there.

Q Why did you sign it twice?

A Well, I think Gonzales refused to sign it.

Q Would you inspect the document and tell me why there are two signatures on it?

A He had refused to sign it, that is Gonzales, Deck Maintenance, and there is my signature under that. "Copies of official entries in log book given to Gonzales and he refused to sign." And I put my name as a witness under here that he refused to sign the log book.

transcript.

MR. KIERR:

I might suggest to the reporter that the filing may be accomplished simply by forwarding the original transcript to the Clerk of the United States District Court in New Orleans.

May I inquire whether counsel will furnish complainant with a copy of the transcript?

MR. WRIGHT:

I believe that on the other depositions in this cause we did not furnish you a copy and that you did not take any out of court testimony, and I think the same Rule should govern here as with respect to the other depositions, that is, if you want a copy of it I think you should order it.

MR. KIERR:

I take it you mean at the complainant's own expense.

MR. WRIGHT:

That's right.

MR. KIERR:

May I inquire if the deposition is taken for purposes of discovery or are you going to use it at the trial in this matter?

MR. WRIGHT:

As I interpret the Rule it is not necessary for us to disclose in advance whether the deposition is being taken for discovery or on the other hand for use at the trial.

MR. KIERR:

I must take exception to respondent's position as

Q What is this other signature for?

A Witness to the log.

Q And the Captain also signed as a witness to the log?

A The Captain signs the log.

MR. WRIGHT:

What is so funny, Mr. Kierr?

A He has to make the entries in the log book and he signs it.

MR. WRIGHT:

This is a serious matter.

MR. KIERR:

Q Mr. Staggers, I am not being facetious when I ask you whether you will admit that your signature on the lower right hand corner of this official log entry constitutes your approval thereof as the Chief Officer aboard the vessel.

A Do you mean do I approve the Master's entry in the log book by signing that?

Q Don't you?

A I witness the log book; I witness the entry in the book.

MR. WRIGHT:

Q Could you get him to change the log book? If you didn't approve of a statement, could you get him to change it?

A I wouldn't sign it if I didn't approve of what he wrote down there.

MR. KIERR:

I think that answers it.

Q Now, would you define for me the word safekeeping as used in that entry?

stated and reserve all rights in the premises.

Thereupon, the said MANUEL GONZALES, was duly sworn to tell the truth, the whole truth, and nothing but the truth, and was examined and deposed as follows:

DIRECT EXAMINATION:

BY MR. WRIGHT:

Q What is your name, Sir?

A Manuel Gonzales.

Q How old are you, Mr. Gonzales?

A I am 27 -- I was born March 3, 1925.

Q What is your occupation?

A Able-bodied seaman.

Q How long have you been a seaman?

A For about 14 years, and I also have been in the Merchant Marine since 1946.

Q How long have you held tickets with The United States Coast Guard?

A Since about 1939, about the last of 1939 when I first got my Coast Guard certificate -- my Coast Guard papers to sail on tugboats.

Q And how long have you held a Coast Guard certificate to sail on ocean-going vessels?

A Since 1949, that is my seaman's papers.

Q Have you held your seaman's papers continuously since 1946?

A I have.

Q Have you ever been called up before a Coast Guard

A Safekeeping? Yes.

Q Yes.

A My impression of safekeeping, keep anything safe where it can't be stolen and nobody can break out, or anything like that.

Q When you approved that entry that Gonzales was placed in irons awaiting the arrival of local police to place him in safekeeping, would you tell us what was meant by the use of the word safekeeping?

A Well, that particular instance, I had said that the man was ashore drinking and we put him in irons. He had this trouble the night before, and he was placed up there so he wouldn't get in any more trouble down there, any more arguments or anything.

Q And wouldn't cut anybody else up?

A I don't know whether he had cut anybody up or not; I don't know whether he cut the man or not. I didn't witness this assault.

Q What is the next entry of that same date?

A Local police declined to take Mr. Gonzales into custody due to length of time before trial unless I leave him behind. "6:00 p.m. Local police declined to take M. Gonzales, Deck maintenance, into their custody, due to length of time before trial, unless I leave him behind. Accordingly released Gonzales after his promise to remain aboard ship until end of voyage, and his promise to drink no more intoxicants in the meanwhile."

Q Does that refresh your memory as to why Gonzales was

hearing officer on a charge of misconduct of any nature?

A No sir, I have never been called up before the Coast Guard. I have never had my papers jeopardized in any way.

Q Have you ever been investigated by the Coast Guard officers on any boat?

A No, I have never been investigated.

Q Have you ever been charged before the Coast Guard with assault or battery?

A No.

MR. KIERR:

I object to the form of the question as being leading and repetitious.

Q Have you ever been logged by the Master or any officer of a vessel aside from the loggings which were made against you while you were on the Mason Lykes?

MR. KIERR:

Objected to as leading.

A No sir.

Q Have you ever been charged and found guilty by any type of court for assault or battery?

MR. KIERR:

Same objection.

A No, I have never been found guilty of assault or battery in any court.

Q Have you ever been charged and found guilty by any type of court for fighting?

MR. KIERR:

Same objection.

not incarcerated ashore?

A Because of the statement, and I read that. According to the statement it refreshed my memory.

Q Why was that?

A Because the ship wasn't there a length of time -- the length of time the ship would be there, if we wanted to place charges against him the ship would have to leave without him, according to the statement.

Q What trial is referred to there?

A I don't know. The trial down there? I don't know because the man never was pressed with charges ashore.

Q Whose trial do you think it would be?

A It refers to Gonzales's trial. If he was taken ashore there would be charges against him.

Q Charges for what?

A Assault and battery, I imagine.

Q Do you know how long Gonzales had been aboard the ship before this assault took place?

A About two and a half months, I think.

Q I meant in terms of hours.

A I beg your pardon.

Q In terms of hours.

A Two and a half months, that would be --

MR. WRIGHT:

How many hours that day.

A That day before the assault took place?

MR. KIERR:

Q Yes.

A No, I have never been found guilty by any court for fighting.

Q When did you sign aboard the steamship Mason Lykes? You don't have to give the exact date, Mr. Gonzales, the approximate date you went aboard the vessel?

A Approximately two months before -- let's see, I was on there all told about three months.

Q Were you aboard the vessel in 1949?

A Yes, I was.

Q Now, how long had you been aboard the Mason Lykes before November of 1949, what period of time?

A Approximately two months.

Q On the morning of November 28, 1949, while the ship was in Walvis Bay, southwest Africa, did you have any difficulty with a member of the engineroom department, with a man by the name of Elie Boudoin?

MR. KIERR:

I object to the leading form of the question.

A Please repeat that again.

Q On the morning of November 28, 1949, did you have any trouble with Elie Boudoin?

MR. KIERR:

Same objection.

A No, I had no trouble on the morning of the 28th, with Boudoin and -- I had no trouble with him in the morning.

Q Can you state whether or not you, at any time, had any trouble with Elie Boudoin?

A I do not know.

Do you know whether he came aboard directly from shore?

A I do not know.

Q Was there a gangway watch posted at the gangway?

A I think the Third Mate was on watch.

Q Doesn't the gangway watch have instructions not to permit drunken crew members to come aboard unwatched?

A The gangway watch instructed not to permit the crew members to come aboard the ship?

Q To board the ship from shore leave.

A No, they are not instructed not to let them come aboard ship. They've got to come aboard the ship some time. The ship is sailing.

Q If Mr. Gonzales came aboard the ship in an intoxicated condition, was there any precaution to be taken with respect to seeing what he was going to do?

A No, none was necessary because we have never had occasion before to take precautions; never had any trouble at all that trip up until this time.

Q In other words, according to the practice aboard the vessel, a crew member could come aboard intoxicated and simply go into the internal part of the vessel without being watched? Is that correct?

A Not necessary.

Q How about with regard to the making of a report? Was any report required to be made with regard to intoxicated crew members?

A With the officer on watch on the bridge then?

Q Yes.

A If they are not causing a disturbance, there's no law requiring you to make a report of a man is intoxicated. If a man comes aboard intoxicated and doesn't cause a disturbance, I don't see any sense in making a report out, or if they don't miss a watch, if they are on free time.

Q Are there any rules about drinking aboard a ship?

A The Articles, and the articles are posted, and a notice is posted on the board not to bring intoxicating liquor on the vessel.

Q Was that or was that not enforced?

A What?

Q Was that or was that not enforced?

A Enforced to the extent of the ability to do it.

Q Do you mean a certain amount of drinking would go on on board the ship?

A Evidently it did.

Q Why do you say that?

A Well, from the evidence there in the statement.

Q Who did the drinking?

A Well, right there didn't he admit he was drinking aboard the ship? Didn't the man admit he got hit with a wine bottle or something? A whisky bottle or something? Every ship you go on is drinking. You post a notice on the bulletin board, and you got the Articles, no intoxicating liquor aboard the ship, and they all sign the Articles. Just like this home thing. You take whisky in your home, and just the same thing, the seaman considers that his home, and they

bring whisky in there the same as you would in your home, I suppose.

Q Did you bring whisky in your quarters?

A Would I bring whisky into my quarters? Occasionally.

Q When this happened, did you have some in there?

A No.

Q Before this happened, had you had some in there?

A Sometimes.

Q When was the last time before this happened that you had some in there, before this happened?

A I don't know.

Q When was the first time you had some in there after this happened?

A I don't know.

Q When did you have some in there after this happened?

A I had some in there last trip. That happened two years ago. Look I am going to make my deposition here. I've got to go.

Q What rating was given Gonzales at the end of the voyage?

A What rating was given to him?

Q In regard to conduct and character.

A No entry made regarding his conduct and character.

Q Isn't it on the ship's Articles?

A No the Articles? Not as far as I know.

Q Didn't you say you hold Master's papers?

A That's right. You make no entry at all to a man's character.

Q Your statement is that no entry was made with regard to

Gonzales' character?

A Not on the ship's Articles, no.

Q Was it made anywhere?

A If it was made, it was made in the official log book.

Q And what rating was given there?

A I don't know.

Q What does the letter I designate with regard to a conduct rating?

A Indifferent.

Q Is that a good or a bad rating?

A Well, that means a man --

MR. WRIGHT:

He testified they fired the man.

A -- a man is indifferent, he isn't bad and isn't good regarding that ship. Indifferent character.

Q Why did you fire him?

A Why did he fire him? On account of that incident there.

Q Now, what was that?

A The incident that happened at Walvis Bay.

Q When he assaulted --

A According to the statement, yes.

Q That's all.

MR. KIERR:

In connection with the testimony I ask the reporter to identify the first document as Staggers -1, the second document referred to as Staggers -2, and the press release as Staggers -3.

o-o-o-o-o

REPORTER'S CERTIFY

I certify that the foregoing sixty-two pages of testimony are an accurate reproduction of the proceedings had in the above numbered and captioned cause, in the offices of Terriberry, Young, Fault & Carroll, in the Whitney Bank Building, New Orleans, on Friday December 19, 1952, as more fully set forth in the title page hereof.

s/ Geo S. Thomas
Geo.S. Thomas
Official Court Reporter
Civil District Court for the
Parish of Orleans
State of Louisiana

o-o-o-o-o

hit me with the clog I hit him with my fist and that is when he fell back in his forecastle.

Q Does that scar still show on your chin?

A Yes.

Q On which side of your chin is it?

A My right.

MR. WRIGHT:

I think we can let the record indicate, if you don't mind, Mr. Kierr, that the witness has a scar on the right side of his chin.

(Mr. Kierr then examined the witness).

MR. WRIGHT:

Now, you have examined the witness's chin, Mr. Kierr, Do you wish to make a statement for the record?

MR. KIERR:

No.

MR. WRIGHT:

Can we stipulate then that the witness has a scar?

MR. KIERR:

Your observation is in the record.

MR. WRIGHT:

I take it then that after this interval of time during which you have been considering my question that you have decided not to enter into such stipulation?

MR. KIERR:

Mr. Wright, I have taken the time to observe that part of the witness's face to which you have referred --

DEPOSITION OF MANUEL GONZALES

(Number and title omitted) (Filed: April 15, 1953)

STATE OF FLORIDA

COUNTY OF HILLSBOROUGH

The deposition of Manuel Gonzales taken pursuant to notice hereto attached and stipulation of counsel hereinafter set forth, at the offices of McFarlane, Ferguson, Allison and Kelly, First National Bank Building, Tampa, Hillsborough County, Florida, at 10:45 a. m. on the second day of April, 1953, before Dorothy B. Adams, Notary Public, State of Florida at Large.

PRESENT:

MR. RAYMOND H. KIERR, counsel for plaintiff.

MR. WILLIAM E. WRIGHT, of the firm of Terriberry, Young, Rault & Carroll, counsel for the defendant.

S T I P U L A T I O N

MR. WRIGHT:

It was stipulated by and between counsel for the respective parties, that the signing, certification and sealing are waived, as well as all objections except as to the form of the questions. All objections, except as to the form of the questions, may be urged to the Trial Judge at a later date. The Court Reporter will make arrangements for the filing of the deposition with the Clerk of The United States District Court, Eastern District, of Louisiana, New Orleans Division. A copy of the notice setting the deposition will be attached to the original

MR. WRIGHT:

We might say, Mr. Kierr, that the Master told me last night the ship was sailing this afternoon and Gonzales would have to return or a replacement for him would have to be made because he is one of the men required by the Coast Guard to be aboard the ship, at least his rating is one of the ratings required. And the time of sailing was unknown because of the cargo operations, which were uncertain.

MR. KIERR:

I am not so sure I follow the purpose of you addressing these comments to me. Is there anything in particular you would like me to do with regard to this matter? Needless to say, I shall be delighted to do anything within reason to facilitate the sailing of this vessel.

MR. WRIGHT:

Mr. Lykes called me and said he would call here sufficiently in advance of the sailing of the ship so that possibly we could make arrangements to get the witness back to the vessel. However, I told him if it was necess ary we would hold him here and fly him to the next port and they would have to get a replacement. Of course, if we receive notice of the sailing we would like to get him back if possible and I was just telling you that so you could understand the reason, which answers your next question.

MR. KIERR:

Then you were not implying I should waive my cross

A At any times?

Q At any time throughout the voyage?

A Only in Walvis Bay, but that is whenever the difficulty arose that morning -- that night. -- That morning, I would say.

Q Do you remember whether or not in November of 1949 while you were on board the Mason Lykes there was a crew member named Elie Boudoin?

A In the morning --

Q Was there a man by that name on the ship during November of 1949?

A Yes sir.

Q What was his rating on the ship?

A I think he was an oiler, I am not for sure.

Q And what was your rating on the Mason Lykes?

A Deck Maintenance.

Q Now, would you tell us in your own words what, if any, trouble you had with Boudoin while you were on the ship?

A Well, it has been -- it has been four years ago, I mean, I cannot remember the exact movements of it but if I am not mistaken we got in on Thanksgiving Day.

Q What do you mean by "you got in on Thanksgiving Day"?

A The ship entered Walvis Bay, we got in port on Thanksgiving Day. So, we was the last ones to get off, and so the bosun, myself and the other deck man, we were going uptown around 5:00 o'clock in the afternoon and we heard a bunch of kids hollering and somebody cussing, and it was

rather far away, and we looked around and we saw Boudoin with a bunch of these native kids and he had, I would say, six or seven jugs of wine with him. So, we made a remark Boudoin had already got uptown and got his wine. So we went to the Atlantic bar and a couple of little places, I guess everything closed up around 10:00 that night so we picked us up three bottles of scotch whiskey and came back to the ship and went in our forecastle and was drinking and telling jokes and taking it easy. And so then Boudoin came in with his shorts on and about three days growth of beard, I guess, on his face. It was, I think, one of the other guys he asked for a drink, and I think the other deck man told him, no, he was already gassed up and supposed to be on watch then and he went around to his forecastle. And sometime that morning I come out of the bosun's forecastle and went out to our restroom -- to the head, and Boudoin called me to come down the passageway where he was, and I went to see what he wanted and he asked me if I wanted a drink of wine and I said no, and he wanted to know if I was too good to drink with him and I said no, I wasn't too good to drink with him, I said I didn't want any wine and I started off and Boudoin called me back and I turned around and went back and said, "What do you want"? And he had a shower clog in his hand and he rapped me under the chin and I hit him with my fist and I knocked him down and he fell on the deck with all these bottles of wine he had, on the deck. And I heard yelling and hollering and

screaming and I got excited and from there on I can't recall the other events that happened. I don't know what taken place until the next morning when I woke up in my bunk. So, that is the story. And then the next morning at 8:00 o'clock I turned to, which was Friday, so they put me cleaning up the hospital where Boudoin was. He was lying up in the hospital so when I went in to clean, swab the place out and get it shipshape Boudoin started talking to me, he was going to do this and he was going to do that and he was going to get my papers taken away from me and all, so I walked out of the hospital and went back to my forecastle and got a few pounds and went back to shore.

Q When you went to the hospital that morning to clean up was anybody else in the hospital other than Boudoin?

A No, just Boudoin and myself. Just him and I was in there.

Q How long did you stay in the hospital room?

A About thirty minutes.

Q And then what if anything did you do?

A I went -- well, after he got to saying that he was going to have my papers took and going to do this and going to do that, and I didn't want to hear that, I was sick with a hangover, and I went back to my forecastle. I had money in my forecastle and I went and got it and went ashore. And I don't know what time I was coming back to the ship but anyway, the best I understand from the crew, they say when I come aboard ship I had two bottles of scotch

Lykes I was staying, if I am not mistaken, at 102 Bourbon, or 201 Bourbon, something like that, a little hotel there, a rooming house.

Q Then Mrs. Rushing's place was not the last one in which you lived in New Orleans?

A No, but I stayed there. I have stayed at 530 Louisa Street with Mrs. Estelle Rushing up until the last time I was there.

Q Can you give us any other addresses?

A That is all.

Q Have you ever been in New Orleans when you had no address?

A On ships, sir.

Q Have you -- can you tell us whether or not you have ever been questioned by the police regarding your address at which time you may have told them you had no home or that you had no local address?

A I don't think I quite follow you, Mr. Kierr. Would you mind repeating that questions, please?

A Have you ever told anyone that you had no address in New Orleans?

A That I had no address? -- Well -- Mr. Kierr, I was questioned one time by the police but I gave them an address and -- I gave them an address.

Q That was the one on Esplanade?

A Yes, sir.

Q When you say you were questioned one time by the police,

with me and the skipper met me at the gangway and I gave him the bottles of whiskey and he dropped them over the side and put me in irons.

Q Do you remember anything yourself or just what people told you?

A What they told me.

MR. KIERR:

Object to the leading form of the question.

A Because I don't even remember leaving the Atlantic Hotel.

Q After these events took place did you have more dealings with Boudoin on the vessel?

A No.

Q Since you served on the Mason Lykes have you been going to sea?

A Yes sir.

Q What vessels have you been on since you served on the Mason Lykes?

A I have been on the Dwight L. Moody and the Stella Lykes and the John Lykes and the Elizabeth Lykes. That is for this company, then I have been on the -- I mean in this period of time with Lykes Brothers' ships, but I was on several coastwise tankers in that time.

Q Do you have any scar where Boudoin struck you?

A Yes, whenever -- under the chin, here, that is when he hit me with the shower clog. Whenever he hit me that is when I -- I turned around and hit him -- whenever he

MR. WRIGHT:

And I may say that not only have you done that, Mr. Kierr, but you have examined the witness's entire face and the back of his neck.

MR. KIERR:

Please understand that my observation of this man does not constitute an examination. I am not a medical practitioner and I don't profess to be able to analyze what this man presents. He has some irregularity on his chin which to me, as a layman, would appear to be principally a narrow or hairline scar or irregularity. If you ask me to stipulate that it is or is not recent, or that --

MR. WRIGHT:

I didn't ask you that.

MR. KIERR:

Of course, it occurs to me that what you seek to get me to stipulate could best be accomplished by a photograph or by having this man examined by a physician. It appears that this man has a scar, it appears to me that this man has a scarring irregularity and it occurs to me that it is of a type you might find where a person cuts himself while shaving with a razor or such as may be made by a piece of glass, et cetera. -- Leave out that et cetera.

MR. WRIGHT:

Leave out nothing. Let the record reflect everything that is said.

MR. KIERR:

What I mean to convey is this -- that this irregularity is possibly a superficial one on the outer surface of the skin which I cannot observe from the place where I am sitting across the desk from the witness. Incidentally, that was the reason I had to walk over to the witness and inspect him a moment ago.

MR. WRIGHT:

Could we stipulate that the scar is approximately one inch in length?

MR. KIERR:

May I suggest you have that scar photographed?

MR. WRIGHT:

Yes, we will be glad to do that.

MR. KIERR:

If you think it is pertinent to this matter.

MR. WRIGHT:

You will be willing to have a photograph made, Mr. Gonzales?

THE WITNESS:

Yes, but the ship is sailing today -- I mean --

MR. WRIGHT:

I think we may be able to have enough time, it depends upon what time we finish here.

THE WITNESS:

I am willing.

examination?

MR. WRIGHT:

Oh no.

MR. KIERR:

Let us get along with the matter.

BY MR. WRIGHT:

Q Are you a member of any maritime union, seamen's union?

A Now, yes.

Q What union?

A The National Maritime Union.

Q How long have you been a member of that union?

A Since 1947.

Q Are you in good standing with the union at the present time?

A Yes sir.

Q Have you ever been suspended or expelled from the union?

MR. KIERR:

Object to the leading form of the question.

A No, I have not. I have never been suspended or on probation.

MR. WRIGHT:

That is all.

MR. KIERR:

May I note for the record that in interrogating the witness we reserve all rights in this matter, including to

the respondent's taking or tendering of this deposition or objectionable parts thereof.

MR. WRIGHT:

Mr. Kierr, you have no cross examination?

MR. KIERR:

Are we on the record?

MR. WRIGHT:

Yes.

MR. KIERR:

I shall interrogate Mr. Gonzales.

CROSS EXAMINATION

BY MR. KIERR:

Q Where were you born, Mr. Gonzales?

A Lima, Mississippi.

Q Is that your home?

A No, Moss Point, Mississippi, is my home.

Q Are you single?

A Yes sir.

Q Have you ever been married?

A I have never been married.

Q Where is your family living?

A My sister -- my mother and father are deceased. My sister lives at 1208 Elder Street, Moss Point.

Q Is that your home?

A Yes, that is my home.

Q When were you last there?

A In 1948 -- I cannot recall what month but it was in the

summer of 1948.

Q That is the last time you have seen your sister?

A Yes.

Q Do any other members of your family live in Moss Point?

A No.

Q Where do you vote?

A I don't vote.

Q Well, do you have any other address besides Moss Point?

A No, I -- that is my mailing address, to my sister, in Moss Point, Mississippi.

Q How do you get your mail from her?

A Well, I usually write her and she sends it to me.

Q Is there any port which you consider your home port?

A Well, I guess New Orleans in a way is my home port.

Q You usually ship from New Orleans?

A No, I shipped over there but I mean -- generally speaking, if I am speaking to another seaman and he asks me what is my home port, I tell him New Orleans.

Q What is your address in New Orleans?

A My last address was 530 Louisa Street, Mrs. Estelle Rushing.

Q And prior to that where did you live?

A Prior to that -- I lived while at 936 Esplanade. That was just casual, a time I was in there and I rented a room there.

Q Can you give us any other addresses at which you lived?

A Yes, sir, my last -- when I shipped on the Elizabeth

do you mean that was the only time you have been questioned by them?

A By the -- yes, sir, that was the onliest time I have ever run afoul of the law and was questioned.

Q That is not the only time you have ever been in police custody, is it?

A I was -- I had a wreck one time, I bumped a taxi-cab and was put in jail for about six hours.

Q Where was that?

A In New Orleans. That was at Cleveland and Broad.

Q When was that?

A If I am not mistaken that was in 1949 -- in 1946. I was put in the sixth precinct, they took me over to the sixth precinct.

Q Did you pay a fine?

A For reckless driving, a five-dollar fine.

Q You plead guilty to reckless driving?

A I pleaded guilty to reckless driving.

Q Have you told us all of the times you have been in police custody?

A Ah -- no sir. In Baton Rouge I went to sleep in a bus station there and was put in I think for six hours for being drunk. There was no charges. They let me out the next morning, let me out that day, about 10:00 o'clock.

Q When was that?

A Sir, that date I cannot recall. That has been several years back. It was, I would say -- the date I am not

sure, it could be -- it probably was in 1950 or 1951, but I don't remember -- no, not the year. I don't remember.

Q Were there any other occasions?

A Well, I was picked up one time on Laurel, waiting for the streetcar, sleeping on a coca-cola case. I was going back to the ship and I was held six hours on that.

Q When was that?

A That was -- I think that was in 1950 or 1951. I think that -- sir, I think that was in 1951.

Q You are now referring again to New Orleans?

A Yes sir.

Q Were there any other times you have been arrested? Have you been arrested in any other state?

A No, sir, I have never been arrested in no other states, sir.

Q How about within the last year?

A No sir, I have not been arrested in the last year.

Q How about prior to these incidents or prior to the incident on the steamship Mason Lykes?

MR. WRIGHT:

How about what now? Let's get the question straight.

Q Do you understand, Mr. Gonzales? I am talking about you being in police custody or arrested?

MR. WRIGHT:

Let me say this, if we are going to continue this line of interrogation, you understand of course, all objections except as to the form of the question are reserved to the

time of the trial, but I must advise all of these questions, as I understand the issues in this case and the rulings that have been made by the Trial Judge throughout would prohibit that line of cross examination on the grounds it appears irrelevant and immaterial. And I think counsel's questions should be confined to arrests prior to the Mason Lykes which would be pertinent to the issues in this case, because that is what the Judge ruled. He ruled that only the events prior to the Mason Lykes with reference to convictions would be relevant. And now we are propounding questions on arrests for things which are not relevant and including in the questions periods of time after the Mason Lykes. I think you can confine your questions to events before the Mason Lykes which would pertain to the issues in this case. That certainly would be in order, but otherwise we are going to urge objections to these questions.

MR. KIERR:

Would counsel quarrel with the fact that the witness's credibility is relevant to the issues?

MR. WRIGHT:

No, I think credibility of any witness is a relevant issue.

MR. KIERR:

Read the question.

MR. WRIGHT:

Do you understand the question before you now, Mr.

back to the ship and so -- maybe I am not for sure on this-- but I am -- I was -- when I was picked up, if it was September 8, and gave no address I must have been aboard the ship at that time because I don't remember -- the dates and times and places, but I was picked up sleeping on Laurel Street waiting for the bus to get back to the ship.

Q On that occasion --

A Mr. Kierr, I am not for sure if it was on that occasion, or not, but in September I was aboard the Mason Lykes.

Q Is that the first voyage you made on her?

A Yes.

Q And the only one?

A Yes sir.

Q Do you have your discharge with you?

A Not with me, no. No sir, not the Mason Lykes.

Q Were you on the port payroll while aboard that vessel or did you join her just before sailing from --

A I think we had a port payroll -- we signed off and signed on, but it is kind of hard to remember because I have been on quite a few ships since then and I have been on a lot of port payrolls since then. I don't remember for sure if it was the Mason Lykes or some other ship.

Q If I told you that the New Orleans police records show also that on August 11, 1952, a white male named Manuel Gonzales was booked in the fifth precinct station, Item No. H-4004, a person born in 1925 and stating that he had no home, would you --

A During what sir, in 1945? -- Repeat that.

MR. WRIGHT:

1952, isn't that the date you gave?

Q Being a person born in 1925, who stated he had no home, would you agree that you were then booked for drunkenness?

A Yes.

Q How many months ago was that?

A Oh -- that was -- I would say in 1952.

Q How many months ago would that be? August of 1952?

A August of 1952, sir?

Q Yes.

A The fifth precinct station -- I know I was booked in that precinct.

MR. WRIGHT:

He said how many months ago was that. How many months ago was August of 1952? You have to figure it out.

A That is about 7 months, 8 months, going on 8 months.

Q That was in the last year?

A Yes, it was in the last year that I -- that little incident -- I mean, being arrested for drunkenness like that -- I -- in a way it seems like a long time and that little incident, I forgot all about that.

Q How about the incident when you were arrested from Esplanade Avenue, what was that about?

A Well, I was arrested and was accused --

MR. WRIGHT:

Wait a minute. I think you know, Mr. Kierr, this matter has been ruled upon by the Court and you are now attempting to elicit information from the witness which the Judge ruled irrelevant, on the grounds that no conviction was involved and the charge was dropped. Of course, if you want to go into a matter that the Judge has ruled out I am going to let the witness go ahead and answer it because he is here to give his deposition under the rules for discovery or for use in evidence, but I certainly think that you should give respect to the Court's ruling.

MR. KIERR:

I am sure the Court knows, as I would assume you should know, that I intend or contemplate no disrespect to the Court.

MR. WRIGHT:

Let me state this. Mr. Kierr, if you go beyond, and I think you are now doing so, the direct examination, then you are making the witness your witness for the purpose of discovery or for use at the trial in accordance with the notice that we served. In other words, it is my appreciation of the rules of law that this deposition taken for discovery or for use at the trial should be limited to the direct testimony and that if you go beyond the direct testimony in cross examining the witness that you are then conducting the deposition for discovery or for use at the trial on your own and that as to these questions the witness becomes your witness and the consequences which flow from that

Gonzales?

THE WITNESS:

I don't think I quite follow him -- before -- Mr. Kierr, would you please repeat the question?

BY MR. KIERR:

Q Were you in police custody at any time before joining the steamship Mason Lykes for the pertinent voyage?

A No, sir, I was not. I was not in the police custody. I was not in the custody of the police before the voyage.

Q How about -- strike that, please. What was the date of your birth?

A The 3rd, 3rd and 25th.

Q Mr. Gonzales, if I told you that the records of the New Orleans police show that a white male named Manuel Gonzales was taken -- was booked with drunkenness by the first precinct station on September 8, 1949, item I-1754-49, and that the said Manuel Gonzales gave his age then as 24 years and further declared he had no local address, would that cause you to change the statement you have just made?

A On September 8?

Q Yes, that would be during the -- that would be in the neighborhood of the time you joined the Mason Lykes.

A Sir, Mr. Kierr, if I am not mistaken I think I was aboard the Mason Lykes at that present times because I was returning back to the ship and I was waiting on a bus, a 5:00 o'clock bus in the morning on Laurel Street going

fact, such as the expense of taking the testimony, et cetera, will result.

MR. KIERR:

Assuming that I am familiar with the said rules and the laws of evidence, should I infer that counsel is seeking to sell me the idea that I should not ask the witness these questions?

MR. WRIGHT:

No, I am not trying to sell you anything. I am merely telling you that we, like you, are reserving all our rights with reference to this deposition. And one of our rights is to confine you in your cross examination to the direct examination and if you do not confine your cross examination to the direct examination, it is our appreciation of the law that the witness becomes your witness for all purposes set forth in the rules, such as bearing the charges of the reporter and the other consequences that follow from the standpoint of evidence.

MR. KIERR:

According to the stipulation which you dictated into the record, wouldn't the proper time for these objections be when the transcript is offered in evidence?

MR. WRIGHT:

Not necessarily. The objections are reserved to the time of the trial, I think however, that I owe it to you as a fellow member of the Louisiana Bar to let you know I am going to take advantage of our rights as you so generously

did do when we started out.

MR. KIERR:

If your motive is so noble I must pause to thank you. So that the sailing of this vessel will not be delayed, may I return to the purpose of our being here, namely the interrogation of Mr. Gonzales. Please read the question, the last question to the witness.

The reporter read the question as follows:

"Q. How about the incident when you were arrested from Esplanade Avenue, what was that about?"

A Well -- What was it about? -- What it was actually about -- We had a party, you know, had a party going, so --

Q Was this party such as you described on the ship where you were all taking it easy?

A No, sir, not taking it easy. I was drinking my part and most of the people there I didn't even know.

MR. WRIGHT:

Let him answer one question at a time.

A So, about 10:00 o'clock I guess, I was pretty full, so I went to sleep. So, at that time -- There was a lady waked me up the next morning, Saturday morning, saying, "Come look at Jake", or something like that, she called the guy by hi name, and she said, "He has been killed." So I went in there and looked at him and I said, yes, so she asked me for a nickel to call the police and I gave her a nickel and she called the police and I went back and hit my sack and the next thing I knew the police were in the room and

they got me up and I was wheeled down to the jail and fingerprinted and they took scrapings from under my fingernails and all that and from there I was taken to the hospital. Jake was lying up there on a hospital table so they could -- one of the police asked him, asked Jake, "Is this the man that cut you?" And Jake was just lying back, he was gassed up again, so he said yes. So I wheeled back down to the jail, they taken me down to the jail. So the next day I got bond and so they -- see, I went ahead and shipped out and when I come back in the lawyer told me to wait around a few days so I waited around so I was acquitted. I mean, they -- I was not convicted, they found no evidence I had done it and which I pleaded innocent so that was -- I wasn't convicted.

Q You mean there was a trial of the case?

A No, there was a hearing. It was a hearing.

Q Before a Judge?

A No sir, a hearing and I was -- after -- it was a hearing, I don't understand court procedure, but I went to a hearing with my lawyer and the Judge asked me how did I plead, guilty or not guilty and I pleaded not guilty and I -- The charges was dropped later on.

MR. WRIGHT:

Do you think you should identify the date of this inciden that the witness has been talking about?

Q What was the date, Mr. Gonzales?

A I cannot recall the date, it was in 1949.

Q Did you take an oath and give testimony as you did here today when this hearing was conducted?

A Yes, I did.

MR. WRIGHT:

Don't you think you should ask him whether it was before or after he was on the Mason Lykes?

Q Do you remember?

A I -- no sir, I don't remember the month or the date. That is -- Mr. Kierr, that has been -- That incident took place back in 1949 and I cannot recall the dates.

Q What incident are you referring to now?

A Well --

Q The cutting of this man Jake?

MR. WRIGHT:

I object to the form of the question.

Q Where was the hearing, before a Judge?

A Well sir, Mr. Kierr, I didn't cut him, I didn't cut Mr. Jake.

Q It is your position now that you were wrongfully accused of doing so?

A Wrongfully accused -- I never gave it a thought that way, no. I -- Wrongfully accused -- No sir, I guess the police was just doing their duty and I was in the next room so they -- I guess they pinned it on me, they wanted to find out something and they probably figured I knew somebody or something like that or knew his activities or something, so they just questioned me and fingerprinted me and so forth

and so on and then at the hearing I was asked was I guilty or not guilty, so I said I was not guilty so they -- so I wasn't convicted.

Q Was the man who had been cut present at that time?

A Present, at the hearing? -- I don't think he was.

Q Had you seen him at any time during the period beginning when you last saw him in the hospital until this hearing took place?

A When I saw him in the hospital when the hearing -- I went up to the hospital where he was but I don't know if it was before the hearing or after the hearing. I don't recall if it was before or after.

Q When did the hearing take place, was it a matter of days, weeks or months after the arrest?

A I would say within a week, I am not too sure of that.

Q As a matter of fact, wasn't that matter dismissed because of the failure of the other man, Jake, to appear at the hearing?

A That I don't know, Sir.

Q Had you asked him not to appear?

A No. I -- When I saw him in the hospital I just -- I just went in and spoke to him and stayed a couple of minutes and left and that was the last time I saw him.

Q Who was the person that awakened you that night when Jake was cut?

MR. WRIGHT:

I think he said it was in the morning, didn't he?

Q What was --

MR. WRIGHT:

I object to the form of the question. I think it is contrary to his previous testimony.

Q Was it dark or light?

A It was dark, it was in the morning. I would say it was pretty early in the morning but I don't remember the lady's name that called me.

Q Was she the landlady?

A No sir.

Q Who was she?

A Probably another tenant, I don't know.

Q Had she previously been drinking with you and Jake?

A Which -- You mean the lady that called me? No sir, I don't think -- It was -- It was two ladies in the -- The one that called me, I don't think, I don't remember seeing her that evening.

Q You were drinking with the other one?

A Yes sir, we had one drink and that is when I cut out, I went and hit my sack. I left her and Jake in there in the room, in the little dining room.

Q I thought I heard you mumble something which was indiscernible when you were telling what happened after you had the one drink?

A Oh, well I left. I will repeat it. I said we had drink and I cut out and went and hit the sack. That is just what I said, and then I corrected it and said that is when I left

and went to bed.

Q What do you mean by "cut out"?

A We use that when you leave, that is a slang word for leaving, just like hitting the sack is going to bed.

Q Then you were not drunk that night or morning?

A Yes, I was pretty drunk.

Q From that one drink?

A No sir. The party was breaking up, see, people was going home so this lady come there, she come in late or something like that, I mean I don't know, but anyway Jake said I got a drink left and he went to his room and got it and come down to the kitchen and we all three had a drink and that is when I left. I went back to my room.

Q When you left was Jake there alone?

A I couldn't tell you if he was alone or not.

Q If I told you that these incidents at 936 Esplanade had been after you got off the Mason Lykes, would that refresh your recollection?

A These things that happened at 936 Esplanade Avenue would do what to my memory I never got the last part of it, Mr. Kierr. You moved your hand over your mouth or something, I never understood that.

MR. KIERR:

Did the reporter understand my question? If so, would you read him the last part of it.

The reporter read the question.

A No, I don't say -- no sir, I don't see how that would

help my recollection any.

Q Were you drinking heavier during 1949 than you are now in 1953?

A No sir, I -- just about the same, sir.

Q I would ask you that question particularly with reference to the time you served on the Mason Lykes, pointing out to you that you were charged with drunkenness shortly before joining or at the time of joining and had this trouble aboard the vessel in Walvis Bay, and that you did this heavy drinking after the voyage -- heavy drinking not long after the voyage --

MR. WRIGHT:

I object to the form of the question.

Q In other words, Mr. Gonzales, were you drinking particularly heavily when you were on this Mason Lykes?

A No, I was not drinking particularly heavy.

Q It was just about average for you?

A I would say -- well, an average, I don't know what you consider an average. An average -- but I would say it was about the same -- well, about an average of drinking.

Q What was the date you joined the Mason Lykes?

A Let's see -- we were paid off I think, December 31, something like that and we started around September -- the first I guess.

Q 1949?

A September -- October, November, December -- September-- no sir, I cannot recall. I was on there close to three

months so it probably was.

Q What was your job?

A Deck Maintenance.

Q Mr. Gonzales, you have already stated that in your direct testimony, but I may explain to you that because of certain rules of the Court and of law under which Mr. Wright, who conducted your direct testimony, may choose not to offer it into evidence, because of that possibility I must go over some of these same facts with you to insure against the event that the respondent did not offer its interrogation.

MR. WRIGHT:

I am sure you are absorbing all of this, Mr. Gonzales.

THE WITNESS:

I have not understood much he said, not in that last testimony because it is so slow and long until I -- I didn't follow him.

Q It wasn't a question, Mr.Gonzales, but only a statement of policy for the record. Incidentally, my reference to the respondent, I mean Lykes Brothers Steamship Company. You are presently working for Lykes Brothers Steamship Company, Mr. Gonzales?

A Yes sir, I am now employed aboard the Elizabeth Lykes.

Q Was the Mason Lykes the first vessel you served upon?

A For Lykes Borthers Steamship Company? No sir, it was not.

Q How many other Lykes Brothers vessels had you worked on

before that one, the Mason Lykes?

A I was on the Amelia Earhart, a Liberty ship and I was on the Letitia Lykes -- the Letitia Lykes, that was two and I think that is -- I think that is all I served on. I don't recall if it was or not.

Q As Deck Maintenance aboard the Mason Lykes were you in the same or a different department with reference to Elie Boudoin?

A I was in the deck department and he was in the engine department.

Q Did you or did you not share the same forecastle with him to sleep?

A With whom?

Q Boudoin.

A No sir. I slept in the 8 to 12 forecastle in the deck department.

Q While in port at what time did your duty end?

A From 8:00 o'clock until 5:00 p.m., 8:00 a.m. to 5:00 p.m.

Q During the morning when Boudoin was -- put it this way-- strike that please -- were you to turn to the morning of the Boudoin incident in Walvis Bay?

A Yes, I was.

Q At 8:00 a.m?

A Yes sir.

Q During that time did any incident take place?

A I would say --

MR. WRIGHT:

I object to the form of the question.

MR. KIERR:

As being leading, Mr. Wright?

MR. WRIGHT:

I object to the form of the question as being vague and incompetent and there fore unanswerable.

MR. KIERR:

If it is not objected to as being leading I shall not have to re-phrase it.

MR. WRIGHT:

I include the objection as being leading.

Q Mr. Gonzales, did anything of an unusual nature occur aboard the Steamship Mason Lykes in connection with Elie Boudoin?

MR. WRIGHT:

I object to the form of the question.

Q Are you able to answer the question?

A That something of -- nature, in what way, sir? -- Nature --

Q Mr. Wright objects to me leading you so I have to ask you to furnish me with the information.

A Well, I do know this, sir. He would urinate in his bed, in his sack and that is --

Q I mean anything --

MR. WRIGHT:

Let him answer the question fully, now.

Q I am referring to --

MR. WRIGHT:

Wait a minute, he has not finished.

Q At this time --

MR. WRIGHT:

Wait a minute and let him finish. You can finish your answer, Mr. Gonzales.

Q I am referring to any incident having to do with illness or physical injury while the vessel was in Walvis Bay?

MR. WRIGHT:

Now, I insist that the witness be given an opportunity to answer the question. I am quite certain he wasn't finished. I think the question should be read back to him and he should be permitted to answer the question fully. Would you read the question back to him?

MR. KIERR:

Mr. Wright,you will have an opportunity to--

MR. WRIGHT:

But you cannot interrupt him before he has finished, Mr. Kierr. The man was still talking and it was obvious that he had more to say with reference to the question you had put to him.

MR. KIERR:

Isn't it as obvious to you, Mr. Wright, as it is to me that the witness's answer was not responsive to the question?

MR. WRIGHT:

Then you will be able to urge your objection at the time of the trial, but I don't think you can substitute yourself for the Judge here and determine in advance that his answer is not going to be responsive and cut him off before he has finished, and I am going to insist that the question be re-read to the witness in view of the interruption which has followed, and that he be given an opportunity to state whatever he wished to state in reply to the question.

MR. KIERR:

Now, I --

MR. WRIGHT:

If the answer turns out not to be responsive the Judge will rule on it.

BY MR. KIERR:

Q Mr. Gonzales, I would like you to tell me --

MR. WRIGHT:

I am going to instruct the witness not to proceed and not to answer any more questions until he is given an opportunity to answer the last one.

MR. KIERR:

Please don't interrupt me, Mr. Wright.

Q Mr. Gonzales, in case this has not been told to you, permit me to do so. A leading question, which at this time I am seeking to avoid, is a question asked by me which would suggest to you the answer. The information which I want to elicit from you -- that means to obtain from you,

at this time is whether or not you have personal knowledge of any -- personal knowledge of an unusual incident, let us say, which you personally observed, that is, saw with your own eyes, involving Elie Boudoin in his forecastle aboard the Steamship Mason Lykes on or about November 25, 1949.

MR. WRIGHT:

Before he answers that question I request that the court reporter read him the former question and permit him to answer it and then come back and pick up this second question.

The reporter read the question as follows:

"Q. Mr. Gonzales, did anything of any unusual nature occur aboard the Steamship Mason Lykes in connection with Elie Boudoin?"

A Well, the nature he was in, he would continuously urinate in the sack.

Q With reference to the word "nature", I don't mean, Mr. Gonzales --

MR. WRIGHT:

You cannot interrupt the man, Mr. Kierr.

MR. KIERR:

Obviously he is confused by the use of the word "nature".

MR. WRIGHT:

You used it, he didn't. He has a right to answer the question subject to objection at the time of the trial.

MR. KIERR:

Permit me to explain my question to the witness. I am the author of the question.

MR. WRIGHT:

You can explain to him after he answers. Go ahead and answer the question, Mr. Gonzales.

Q By "unusual nature" I mean unusual kind or character, I don't mean functions of nature.

MR. WRIGHT:

Go ahead and answer it as you think proper.

A He was continually urinating in the sack and as to shaving or washing or cleaning up, that was an impossibility, he never did do that,and his -- his socks, he wore them until they got so dirty they fell off his feet, and otherwise about his nature, that is as far as I can acknowledge.

MR. KIERR:

I object --

A And he --

MR. WRIGHT:

Let him finish.

MR.KIERR:

I object to the witness's testimony as being not responsive to the question.

Q Could I put it to you this way, Mr. Gonzales, I am only trying to be fair: The emphasis I want --

MR. WRIGHT:

Write out that word colon, write out those punctuation

marks.

MR. KIERR:

May I say for the reporter's benefit, the emphasis I want to make in this question which that I am propounding to the witness is presented in the following words, to-wit:

MR. WRIGHT:

Well, what about the witness? He has got to understand the question, Ray, and if you cannot understand correctly, if you don't state it clearly and the word colon in the middle of the question, he is not going to get that accurately.

MR. KIERR:

Perhaps counsel's objection is well taken since it appears that his witness misunderstands or confuses some terminology with functions of nature. I am agreeable to striking my use of the word colon. Now, if I may be permitted to return to the interrogation.

Q Mr. Gonzales, can you tell us whether or not Mr. Boudoin sustained an injury on the Mason Lykes?

A Oh yes -- he --

Q Where was the ship at the time?

A In Walvis Bay.

Q And about what day was it?

A Around after Thanksgiving, the next day, I think was Thanksgiving.

Q Now, the day before that happened were you on duty?

A The day before?

Q Yes. Did you perform your duties as deck maintenance?

A The day before -- that was Thanksgiving, huh? We don't work on holidays, only through tying up and letting go, and Thanksgiving we docked in the afternoon and the deck maintenance and the bosun was the last ones to come aboard, so we had worked until, I would say, around 5:00 o'clock that evening, 4:30 or 5:00.

Q Do you have any independent recollection as to whether or not you worked on the day before Mr. Boudoin was injured in Walvis Bay?

A We tied up the day before, we tied up that day.

Q How much work did you perform that day in terms of hours?

A I don't remember how many hours I worked that day.

Q Was it a full 8 hours or not?

A It was on Thanksgiving, it was not a full 8 hours, it was in the afternoon when we tied up.

Q Would you be good enough to give us an account of the things you did when you were not working aboard ship the day before Mr. Boudoin was injured?

A We probably played pinochle.

Q Aboard the ship or --

A The day before -- and we docked there in the afternoon. We were at sea in the morning.

Q You were at sea?

A Yes sir, we was at sea preparing to enter port.

Q Can you tell us whether or not you did any drinking that

morning?

A I don't drink in the morning.

Q Did you or did you not have a drink that day?

A Until around 6:00 o'clock that day, no, I never had a drink.

Q Where did you drink at 6:00 o'clock?

A At the -- I think the name of that, there is two little hotels at Walvis Bay, across the desert a mile from the ship. One is the Atlantic Hotel and one is the American Hotel, just little bars.

Q You went there at 6:00 o'clock?

A We left the ship maybe around 5:00 or 5:30, I guess.

Q In the evening?

A Yes sir.

Q Were you alone?

A No sir.

Q Who was with you?

A The bosun and the other deck man and myself.

Q What is the other deck maintenance man's name?

A This man was Jake, he was a Hawaiian.

Q How long did you stay in that place?

A Until they started to close.

Q What time was that?

A Around about -- I don't know, 10:00 or 10:30 at night.

Q At night?

A Yes.

Q Were you in this place for that period of time, from 4

hours or so?

A No sir, we went in and drank a couple of beers and then we walked through the tavern and looked around. Our main object in walking around was we wanted to see if there was anything else there, any more bars. We looked the place over, it was just a small village and they had a little circus going on, a flying wheel that buzzed around, and we went back around and went back to the bar and had a couple more beers and played the jook and then we got -- we would go from one place to the other, from one bar to the other bar. You know, just walking around killing time is the main thing.

Q What time did you get back to the ship?

A It probably was -- I don't quite remember that the time but I would say it was close to around midnight, anywhere between 11:00 and 12:00 o'clock. Somewhere in there.

Q Were you in the company of the same two men when you returned?

A Yes sir.

Q Anyone else?

A --

Q Anyone else with you at that time?

A No sir, we three came back together.

Q How many drinks did you have up to the time you returned to the vessel?

A That I don't know.

Q Did you feel the influence of the drinks at the time

you returned?

A Whenever we got ready to leave the fellow told us he was fixing to close up and we bought three bottles of scotch whiskey and walked back to the ship and we had a couple of drinks on the way down and we went on board and went in our forecastle.

Q Three bottles of what?

A Some kind of scotch whiskey.

MR. WRIGHT:

I might say I think he misunderstood your question, "Felt the influence."

Q You carried the bottles aboard ship?

A Yes, but -- doggone it, I think -- I think we each one had one, see. The bosun bought one, I know he had one and I know I had one. I don't know if the bosun was carrying two or if Jake carried one. I don't know that. I had one bottle.

Q Was there a gangway watch on duty when you returned to the ship?

A I don't think so, I never saw them.

Q Did you or did you not see the officer of the watch when you returned that evening?

A No, I never saw him. We just walked right aboard and right in our forecastle, in the bosun's forecastle, that is.

Q When were the bottles opened, if they were?

A One was broken whenever we come across the desert, one of the bottles was broken.

Q When you say broken --

A The cap was unscrewed.

Q In other words, it was opened.

A Yes sir, opened.

Q And the three of you had a drink from that bottle?

A Yes sir, the three of us had a drink from that bottle and then we come aboard.

Q That was scotch whiskey?

A It was some kind of South African scotch, it was scotch whiskey, we bought the guy's last three bottles of scotch whiskey.

Q Then what did you do?

A Well, we went into the bosun's forecastle and closed the door and just handed the bottle around and was telling stories and seeing which one could tell the tallest tale, that's all it was, just a jam session and we kept having a little drink now and then.

Q Can you tell me whether or not you won in the contest for telling the tallest tale?

A I can't say if I did or not -- I mean, we were just shooting the breeze, what had happened on one boat and what we had done on another boat, talking about different people we met -- just a general discussion.

Q Can you tell me whether or not any intoxicants were consumed by y ?

A Any intoxicants? Well, we was drinking, we kept drinking our whiskey in there.

Q How much of it was drunk?

A I would say -- approxinately two and a half bottles.

Q Commencing at what time?

A Around -- a little before 12:00 -- between around 11:00 and 12:00 o'clock, whenever we broke -- whenever we took the stopper out of the bottle.

Q And it ended when?

A That morning sometime, I don't know what time it ended.

Q Was it nighttime at that season, was it dark or was it daytime?

A It was still -- it was dusk dark, I would say, I don't know if it was dark or what, all that part of it -- it was in the morning.

Q Will you tell us the size of those bottles you had, the size of those bottles?

A Well, they -- I don't know if they have the same measurements we have or not, but I would say it could have been a fifth or a full quart. I don't know. It was an upright round bottle, like that.

Q How many men participated in the drinking?

A Well, there was quite a few guys come in and have a drink and leave.

Q Who beside the bosun and yourself?

A I don't know, I cannot tell you each one of the names because I never paid too much mind to it. It was we three in the forecastle though, we was just drinking and talking.

Q You say there was three men in the forecastle, how many other men over the course of the evening or early morning had a drink with you all?

A Probably about three.

Q And how many drinks did the other three men have?

A I don't think they -- they just come in and have a drink and leave.

Q Do you or do you not mean by that one drink a person for the other three men that visited the bosun's quarters?

A None of them joined in, they -- they just come in and have a drink and go on and hit their sack, I guess or go out on deck and go to sleep on cots or something, I don't know.

Q Why were they sleeping out on deck on cots?

A Well, if you get real hot weather -- see, some of the guys stand day watches and when they get off watch they move a cot out on the deck.

Q Was the weather hot or cold?

A It was hot in the daytime and very cold at night.

Q How did these men come to the party? That is, were they invited or not?

A No, they wasn't invited -- probably they was invited because some of the guys -- see, ever so often you have to go around to the head, see, and urinate and perhaps -- say sometimes you meet a guy and say, "You want a drink?" You see him in the passageway and you say, "Want a drink?" And

he says yes, and he would come in and have one drink and leave, and that was all.

Q Can you tell us whether or not you met one or all of these men under these circumstances?

A One or all of these men? -- I don't get it.

Q Did you or did you not so invite any one of these three extra men into the party?

A I think there was one guy, a fireman out there and him and I was pretty good buddies and I invited him to have a drink, and I think that is about the onliest fellow I asked to have a drink. I went in the mess hall and got a sandwich and he was going off watch or coming on watch or something and he was a friend of mine and I askedhim if he wanted a drink and he said yes and he came in and had a drink. And I was a little gassed up and he wanted to get away from us. He was sober, you know, and he didn't want to stay around.

Q What do you mean by "gassed up"?

A Drunk.

Q Did you get gassed up every time you drank?

A No.

Q Well, what does gassed up mean? You understand for the purpose of the record I have got to ask you to explain some of these things.

A Well, the way it is, I consider drunk is when a man is staggering and falls down or something like that, that

is what I call being drunk, but gassed up, that is when a man drinks and gets enough -- I mean, a man drinks -- I don't know, that's kind of hard to explain.

Q When you say a man gets enough, what do you mean by that?

A That is when he passes out, staggers and -- falls down and such as that. I mean --

MR. WRIGHT:

Could we have a recess?

(Thereupon the taking of the deposition recessed at 1:30 p.m. and resumed at 1:34 p.m.)

MR. KIERR:

Read the last answer.

The reporter read the answer.

BY MR. KIERR:

Q Was the man you invited in, the fireman you invited to have a drink, named Ernest Coutta?

A Yes, that's his name.

Q Did I understand you correctly to say he did not stay very long?

A No, he didn't stay very long.

Q If I remember correctly you said something about wanting to get away?

A Yes, he was going on watch or coming off watch.

Q Can you tellus whether or not it was something that had anything to do with the drinking you were doing?

A No, I don't think so. You know, when guys are drinking and talking -- I know myself I don't want to be around a

guy when he is drunk.

Q Why?

A In the first place I hate to smell his breath, and if I am going on watch or coming off watch or sleepy or something I ain't going to set up and shoot the bull with guys and miss my sleep.

Q Was it apparent to you Coutta wanted to leave because of your drinking?

A No, it didn't appear that way to me.

Q Could you tell us about how much of that scotch you consumed during these early morning hours?

A Well, I had a drink every time that they had a drink. Now, how much I consumed I couldn't tell you, I guess it was pretty well divided.

Q That would then be something less than one bottle for each man?

A Well, I guess so if you divided by threes. I don't know it was -- two bottles was -- we started on the third bottle, I don't know how much we had drunk out of that.

Q If I recall what you told me thusly, would you say it was accurate? You came aboard with almost three full bottles and during the evening you drank about two and a half bottles and there were three single drinks given to other members of the crew and the three men who were in your party equally between the three of you drank the remainder, is that about right?

A That's about it, I guess.

Q Did you or did you not have enough?

MR. WRIGHT:

I object to the form of the question.

A Now, I don't know -- I mean -- sometimes a guy can drink more than other times.

Q You mean you yourself?

A I mean myself, I can -- sometimes I take two drinks and it makes me heave and other times I can drink all day and never get no drunker and no soberer.

Q Can you tell us your maximum capacity?

A I have never thought of it that way. I mean, I couldn't start to answer your question, Mr. Kierr, because the maximum -- when I drink all the time I don't get drunk. Sometimes I go out and have a few beers in the evening and go to a show and sometimes I don't drink anything at all.

Q What time did the party in the bosun's forecastle break up?

A I don't know what time it broke up.

Q Approximately, was it 1:00, 2:00, 3:00, 4:00, 5:00 o'clock, or when?

A I never had a watch to just know the time, I wasn't even thinking about time but I would say it was -- let's see, I don't have the slightest idea. It was probably after -- maybe around 3:00 o'clock, somewhere in that vicinity, maybe later or maybe -- because I don't -- I don't know the time.

Q I believe you said that during that morning you were in the bosun's room and you went in the head and you were in the mess room, were you in your own room?

A That was -- my own room was the 8:00 to 12:00 room. Three of the men sleep in that forecastle and they were sleeping, and so one of the deck maintenance slept with the bosun and the other deck maintenance slept with the 8:00 to 12:00 watch, so I had no business in my forecastle to go in and wake anybody up, so I was over in the bosun's room.

Q When you say that morning, you mean from midnight until the party broke up?

A Yes.

Q Were you sleeping in the bosun's room or not?

A No sir.

Q Were you dressed in your regular clothes or not?

A I was dressed in dungarees.

Q Did you or did you not go into your own quarters during the hours of the party?

A Not that I remember of, no sir.

Q You mentioned about the men sleeping in that forecastle, what did that have to do with you going in there, if anything?

A Well, that day was a work day and you go in there and wake a man up -- in the morning there, and you are liable to get a shoe throwed at you or something, so I didn't want to wake anybody up. I mean, that is unconscious, that is just a tradition when a man is sleeping not to wake him

up. That's the first thing, I guess, I ever learned, not to disturb anybody from his sleep.

Q A seaman's forecastle is his home aboard ship, isn't it?

MR. WRIGHT:

Object to the form of the question.

Q Or is it not?

A Well, that is where he lives.

Q Have you ever heard the expression used, " a man's castle?" Have you heard that?

A I have heard of a man's castle.

MR. WRIGHT:

I ask you how long you think you will be -- you have no idea of how much longer it will be? This has been going on about three hours now, do you think it will be another hour or less or more than that?

MR. KIERR:

Probably more.

MR. WRIGHT:

May I ask you this then, would you try to terminate this in less than an hour because I am going to have a little difficulty getting to the plane if it is more than one hour.

Q Did you see the officer on watch at any time during the party or not?

A No, I didn't.

Q Do you know who he was?

A No, I don't know which one of the officers had the watch that night.

Q Aboard the Mason Lykes did the officers during the night inspect all of the quarters? Did they make any inspection of the quarters?

A Not of the quarters, unless they are in -- unless there is a reason for it.

Q What do you mean by that?

A Well, if there is -- if they hear loud noises or singing, I guess, playing the victrola or leaving the radio on, then I guess they would investigate. Otherwise I don't think he would come around and check the men's forecastles.

Q Do you know whether it was the practice aboard that vessel for the officer on watch to walk through the alleyways on routine inspection or not?

A That is a practice on every ship, yes sir, for the officer on watch to walk through the passageways and around on the deck and see -- check for fires and so on.

Q What about the companionways and the quarters?

A The companionways in the quarters, sir?

Q I mean the companionways or alleys or passageways which traverse the crew's quarters, in other words, the passageways through the crew's quarters?

MR. WRIGHT:

I object to the formof the question.

Q Or by the crew's quarters?

A The alleyways, we have got straight alleys on both sides, port and starboard, and the engineroom sleeps on one side and the deck department on the other side and the steward's department is scattered all over the ship, perhaps two or three sleep outside, it depends on what conveniences they have got. It is a protection for them. I have saw them many times going up one passageway and down another at different times at night. Sometimes I get up and go to the head or come aboard ship and bump into them.

Q Do you know whether or not the officer on watch when this party was going, made an inspection of the quarters in that manner?

A No, I don't know if he did or not.

Q Did you have occasion to be in any other room aboard the vessel during the course of that party?

A The occasion to be in another forecastle in the course of the party? -- The onliest time I was was when I -- The occasion, the time I was invited in a forecastle was by Boudoin, but I never went in his forecastle. He stopped in the passageway and that is when he asked me did I want a drink and I said no, and that was the onliest time I was invited or had my right to be in a forecastle other than in the bosun's forecastle.

Q Were you ever in Boudoin's forecastle or not?

A Was I ever in his forecastle? That is, including the whole trip?

Q Yes.

A Not that I know of I hadn't because there is no -- I have no business over in their forecastle.

Q How about the night of the party?

A In his forecastle? No sir, it was in the alleyway by his forecastle.

Q Are you familiar with the entry in the log book of this vessel while it was in Walvis Bay?

A Familiar -- no, I was not.

Q Can you tell us whether or not you ever received a copy of any log entries whatsoever?

A On the way back to the States before we got into the States, yes. The Skipper presented me with an entry of the log.

Q Do you have that with you?

A No, I don't. I threw them away.

Q Did you sign for them?

A -- No, I didn't sign for them.

Q Can you tell us whether or not you refused to sign for them?

A Oh, I refused to sign.

Q Did you or did you not oppose the logs or fines?

A Oppose the logs or fines? I opposed that -- I mean I opposed.

Q Do you know what I mean by the word opposed?

A No, I don't think I do.

Q In seaman's parlance did the fines stick or were they

thrown out?

A They stuck, I was fined, yes sir.

MR. WRIGHT:

Are you going to explain to him what you mean by the use of the word "oppose"?

Q Did you go to the shipping commissioner's office and make an objection to the logs or fines or did you not?

A No, I didn't.

Q Do you know whether or not Boudoin received medical attention for his injuries?

A Yes, he received -- ah-- medical attention, yes sir. He received medical attention aboard ship. He stayed in the hospital until we got back to the States.

Q Did you see the doctor in the hospital working on Boudoin?

A No, not to my knowledge I didn't see it, sir.

Q You say not to your knowledge, you mean if you did see him you don't remember?

A I don't remember seeing him, no sir.

Q Did you or did you not try to get into the hospital while Boudoin was there and the doctor was administering to him?

A I don't remember that, sir.

Q Did you talk to the Captain or not while the doctor was working on Boudoin in the hospital?

A I don't remember if I did or not. If I talked to him

or not I don't remember.

Q How about the mate, Mr. Staggers?

A I don't remember him -- I don't remember talking to him.

Q How about the mate, Mr. Brock?

A No, I don't remember him or talking to him.

Q Do you remember talking to Captain Townsend, Mate Staggers or Mate Brock at any time during that day? That is, -- that day, from 12:00 o'clock on?

A Yes, that day. From 9:00 o'clock on?

Q The day during which the party took place and ended.

Q I remember talking to Mr. Staggers after 8:00 a. m. that morning because he told me to clean the hospital and that is when I turned to and --

Q Did you clean it up?

A I started cleaning up and worked maybe a half an hour and quit and went back to shore.

Q Why did you quit?

A Boudoin was lying up in the bed and saying all kinds of things, you know, and I had a hangover and I was sick and feeling bad and he was saying he was going to have my papers took from me, the usual big talk, and I didn't want to hear that and I went back to my forecastle and got some money and went back to shore.

Q Did you or did you not do any drinking ashore?

A I done more drinking ashore, yes sir.

Q Did more drinking help or hurt your hangover?

A Well, I don't know if it helped me, it made me feel better for awhile. I mean, it helped -- stopped my head from aching.

Q Was the way your head felt the reason you don't remember what happened while Boudoin and the doctor were in the hospital?

A No, that ain't why, it was just a hangover.

Q Am I to understand you don't remember whether you did or did not have a conversation with the Captain and the mates while Boudoin and the doctor were in the hospital?

A No, I don't remember.

Q In other words, you cannot say whether you did or not?

A Whether I did or not -- no, I can't say either way.

Q What reason can you give me for not remembering?

A When Boudoin called me to his forecastle and asked me did I want a drink and I told him no I didn't want no drink of wine, that started him and he started hollering and I started to leave and --

Q Did he --

MR. WRIGHT:

Let him finish, Mr. Kierr.

MR. KIERR:

Mr. Wright, this is my witness, these are my questions. It is unfortunate that the deposition must be taken without the Court to rule on our disagreements, but I think that he

would tell you that you should freely allow me to try to convince the witness to respond to my questions rather than not responding to them. I think I can accomplish it by telling the witness this --

Q Mr. Gonzales, I am interested in what happened while the doctor and Mr. Boudoin were in the ship's hospital after Mr. Boudoin was injured. Now, I have asked you whether you remember talking to the ship's officers while Boudoin was being treated in the hospital. I believe you said you don't remember. I want to know whether there is a reason for you not remembering and I think we can determine that by following exclusions. Can you tell me whether or not you don't remember because you were not there?

MR. WRIGHT:

Now, I submit that the witness was trying to answer the question previously and that it still is not fair to interrupt him while in the middle of his explanation and I request that the reporter read the witness the previous question and allow him to continue with his answer to it.

MR. KIERR:

I prefer that you wait until you receive the witness back for your interrogation, Mr. Wright, to pose your questions and kindly permit me to handle my questions.

MR. WRIGHT:

Now, of course, I have the right to ask him questions on redirect examination. However, I don't believe that that

right permits you to interrupt him before he has finished answering and like I said previously when this matter arose before, I object to you interrupting the witness and feel that you should permit him to answer the questions fully, as he desires, and if his answer is not responsive that will be excluded by the court. Frankly, we differ on the question of responsiveness for I believe that what he was saying would be considered responsive to the question and I ask that the unfinished answer -- that the question to the unfinished answer be re-read to the witness.

MR. KIERR:

Of course, you have perhaps an advantage of knowing what this witness will say, whereas I have never talked to him before today.

MR. WRIGHT:

Well, he has told the whole thing now, he has nothing more to add. I will assure you he has told you now everything he told me before the deposition.

Would you go back to that question where he had not finished his answer and read it to him, please?

MR. KIERR:

Mr. Wright, I must again repeat my request, sir, that you permit me to handle my examination of the witness.

MR. WRIGHT:

Well, I move --

BY MR. KIERR:

Q Mr. Gonzales, I wish to pose to you this question, were

you or were you not aboard the ship when Mr.Boudoin was getting initial first aid or treatment in the hospital from the doctor?

MR. WRIGHT:

Before he answers that question he has to answer the former question he never got a chance to answer, and that is his explanation of why he cannot remember being in the vicinity of the hospital while the doctor was treating Boudoin.

MR. KIERR:

I submit that is leading the witness.

MR. WRIGHT:

I don't want to lead him.

MR. KIERR:

Therefore, I object to any statement which the witness may make in line with counsel's suggestion.

MR. WRIGHT:

Would you go back please and read the question he did not finish answering?

MR. KIERR:

Mr. Wright, I must again remind you I am the one interrogating this witness.

MR. WRIGHT:

You are not going to interrogate him any more until he answers that question.

MR. KIERR:

Is i my understanding, Mr. Wright, that you will

instruct this witness not to answer --

MR. WRIGHT:

I will do this, I will not instruct the witness not to answer but I will instruct the reporter that I am not bearing the expense of any more of the deposition.

MR. KIERR:

You need go no further, Mr. Wright. The reporter may bill me from this page on.

MR. WRIGHT:

There is also the question of whether you will be billed for a lot of pages before this, but in other words from now on it is understood between us you have completed your cross examination on direct testimony by your refusal to let the witness answer the question you asked him, and he is now your witness and you are taking the deposition.

MR. KIERR:

That is not so.

MR. WRIGHT:

And with that understanding we will proceed.

MR. KIERR:

That is not so.

MR. WRIGHT:

That is my understanding.

MR. KIERR:

It will reduce itself to this then, unless I go along with your stipulation you are going to terminate the

deposition, which of course will be over my objection.

MR. WRIGHT:

No, you do not have to go along with my stipulation. That is my interpretation of what has transpired. In other words, I place the effect of your refusal to let the witness answer this question -- your interfering with him in the middle of his explanation of the question you asked him means that you have completed your cross examination so far as the direct examination is concerned, and that you are now taking his testimony and that is something for the Judge to rule on. It is the Judge's function to determine the responsiveness of the answer. And too, the importance of the issues, not only in this one deposition, but every deposition we have taken, and you and I have taken quite a few, and I cannot see myself permitting you on these depositions, without the benefit of the Judge's ruling, to interpose any questions in the middle of his answer. And I think that I am entitled to have the Court determine whether you can do that.

MR. KIERR:

That is a gratuitous comment regarding the other depositions, Mr. Wright. First, may I say you are categorically wrong and that the written transcripts of the other depositions speak for themselves and bear me out.

BY MR. KIERR:

Q Mr. Gonzales:

MR. WRIGHT:

I would like to say, Mr. Kierr -

MR. KIERR:

I would like to ask this question.

MR. WRIGHT:

I was not trying to dig up the past depositions, I was thinking of future depositions and there was no intent on my part of imposing the burden on the Court of going into past depositions between us. I think you and I, in view of all the depositions we have taken, should have certain rules and standards we follow in these depositions and I think one is to not interrupt the witness in the middle of his answer. There may be some things I do that are improper and I would be happy to have them rectified, but I definitely think what you have done in interrupting him is not proper and not fair.

MR. KIERR:

If there is anything about this witness's testimony or this deposition which is unfair it is not of my making.

BY MR. KIERR:

Q Mr. Gonzales, can you answer this question yes or no; Were you or were you not aboard the vessel while Mr. Boudoin was getting first aid medical treatment from the hospital from the doctor on the ship?

A --

Q I notice that you have paused for a considerable time

without answering. Is there a reason for the delay?

MR. WRIGHT:

I submit the witness's pause has been very brief.

A On the answer to that question, yes or no -- well, I cannot answer it yes or no.

Q Did you say you can or you cannot?

A Of course, being aboard, I don't remember that, that last time in there and I cannot say yes or I cannot say no to things I don't remember, what I cannot recall.

Q In other words, you are unable at this time to tell me whether you were or were not aboard the vessel when Mr. Boudoin was receiving the first medical treatment in the hospital, is that correct?

A That's right, at that present time I don't remember being anyplace.

Q Your mind is a complete blank with regard to that time?

A The way --

Q Could you answer that yes or no?

A I cannot remember where I was. I know nothing about that lapse of time there. The last thing I remember that morning, whenever it was, was when Boudoin had called me over to his forecastle and offered me a drink of wine, which I refused, and then he asked me --

Q Well, I don't want to go into that with you at this time, Mr. Gonzales, what, if anything, transpired in Mr. Boudoin's forecastle. That is why I am asking you these

questions inviting a yes or no answer. Understand, please sir, that if you cannot answer themwith yes or no tell me that you cannot. The next question is this: Can you tell me, yes or no, whether or not your drinking had something to do with you not remembering the incidents I am referring to.

A Well, I would say that it contributed to it a lot, yes sir, but getting mad is what caused me to lose my memory. That is when Boudoin hit me with the clog and I turned and hit him and he stumbled back and went to yelling and that is as far as I can remember of that night until the next morning when I was called at 7:30.

Q Why were you put in irons aboard the ship?

A I don't know that. When I come back -- when I got ashore I got gassed up again and so when I did come back aboard -- I don't even remember leaving the Atlantic bar.

Q Were you out of your senses when you were put in irons?

A I don't remember coming aboard.

Q Were you out of your senses because of drinking so much ashore?

A When I got ashore there was a Norwegian whaling vessel there and they were singing and playing the guitar and accordian and they drank me under the table.

Q What do you mean by "under the table"?

A They just drank more than I did. I just drank until I don't know no more.

Q In other words, you had had enough?

A I had enough.

Q Was that the reason you do things which you don't remember, such as getting yourself put in irons?

A Well, I don't know why the Captain put me in irons.

Q Was he justified or not?

A That I don't know, I imagine that it didn't make any difference because I don't -- all I done was slept it off and that evening when I come to, when they woke me up, I was all wrapped up, entangled with the cuffs and that was hurting my wrists and the Skipper took them off.

Q Where were you?

A Aboard the ship.

Q Where aboard the ship?

A In the quartermaster's locker aft of the bridge, on the bridge deck, aft of the bridge.

Q Do you think the Master was right or wrong in putting you in irons?

A I cannot dispute the Captain, I cannot dispute his doings.

Q You just don't remember that night, is that it?

A I don't remember him putting me in irons, no.

Q And the reason your memory failed you in that connection, you had so much to drink ashore with the whaling fleet?

A Yes, we had a big party.

Q Does drinking affect your memory in that way?

A If I drink enough, yes sir.

Q You had had enough that day?

A When?

Q When you came back and got -- when you came back to the ship and were put in irons?

A I must have had enough.

Q Did you walk back or did they carry you back aboard ship?

A That I don't know, but the fellows on the ship told me that, they said a couple of Norwegians was with me, we was coming across the desert and the Skipper was watching me through binoculars, and they watched and as soon as I come aboard, I had a couple of bottles of whiskey and I handed him the bottles and he put the cuffs on me and led me away.

Q Why did he do that?

A That I don't remember, I am going by what my shipmates tole me of the incident. I was asking them what happened when I --

Q You don't remember whether or not at any time you had a knife during the morning that Boudoin was injured?

A No, I don't remember that.

Q I notice that your memory is blank following the happening of the incident when Boudoin was injured, whatever these incidents were?

A After he went to screaming and I got excited -- I remember he fell back across the bottles and he went to

screaming and hollering and from then on until they called me the next morning to go to work I don't recall that lapse of time, I don't remember.

Q And the last thing you remember was Boudoin screaming?

A Whenever he hit me and I hit him with my fist, he went back across the bed, the bunk and he fell among the bottles and that is when it happened. He had this wine, five or six bottles of wine sitting on the deck, I don't know how much he had, and he was screaming and hollering.

Q Mr. Gonzales, you seem very insistent on telling me your version of what transpired in his room, notwithstanding that I have not specifically asked you that. What is your reason for wanting to say that so bad that you have undertaken to do it several times?

A No sir, there's no reason. You asked me a question about my memory and wanted to find out if I could remember this or that, which I told you several times that from that period of time that morning until 8:00 o'clock I -- that was blank hours for me.

Q If I recall my question, Mr. Gonzales, it was approximately this: Was the last thing which you remember Mr. Boudoin screaming?

A That is correct, sir.

Q Is it possible that after that you fell -- blacked out?

A That I don't know -- I mean --

Q Where was Mr. Boudoin when he was screaming?

A On the deck.

Q And where were you?

A Standing in the door.

Q In the door to this -- to his room?

A I was by his door to his room.

Q Who was the first one on the scene?

A I don't know.

Q Where did you go at that instant?

A I don't remember.

Q What was Boudoin saying while he was screaming?

A Well, not anything in particular, I mean, he was just yelling, hollering, oh, oh -- something like that.

Q Was he hurt?

A I didn't know if he was hurt or not.

Q How much blood did you see?

A That night I don't remember seeing any blood. The next morning when I went to cleaning the hospital they had some gauze and stuff that was bloody. That is all the blood I saw.

Q I feel at this time from what you have said and from other indications that you would apparently have me believe that the reason you don't remember is because you allegedly received a blow yourself, is that a correct or incorrect impression I have?

A Mr. Kierr, I don't quite follow you, is that correct

or incorrect -- whenever he hit me that is when it made me mad and then -- then when I got mad and excited, well, I was -- that was all I can remember.

Q Well, then, it was not the force of any blow that you received which caused your memory to be impaired, was it?

A Sir, I don't have the slightest idea how hard you have to hit a man to knock him unconscious, I don't know anything about it.

Q Were you knocked unconscious?

A -- No sir.

Q Have you ever been knocked unconscious?

A Not to my knowledge I have never been knocked unconscious.

Q Have you ever got a blow where it staggered you?

A Yes, I have got a blow that staggered me before.

Q Did you ever stagger any other man with a blow?

A Why yes sir, I guess in a fight somebody got staggered.

Q What fight are you talking about -- on this ship or other ships?

A Not on ships.

Q Ashore you mean?

A Ashore. You know, we would be drinking and would be someplace in a bar, or a tavern drinking or something and get in an argument.

Q When you say fight, you mean fistfight?

A Fistfight.

Q Can you handle yourself in a fistfight pretty well?

A Well, I don't know --

Q What is your weight?

A About 170.

Q How many fights have you had in your career?

MR. WRIGHT:

I object to the form of the question.

Q Of course, I mean your carrer of going to sea, you are not a pugilist or a professional boxer?

A No.

Q Since you have been going to sea how many fights have you had?

A On the ship I have never had any trouble that I was involved in but with Mr. Boudoin, but I have had a couple of scraps in foreign ports with foreign fellows.

Q Were you in jail in any of these ports?

A No sir.

Q Were you arrested?

A No sir.

Q Who was the agressor in these fights?

A Well, lots of times you drink in a place and sometimes Italians don't like Americans, and we get in arguments about Americans -- in most places they don't like Americans and usually -- I don't remember only two incidents I ever had trouble in foreign ports. I think there was one time in

Anzio, Italy, in 1946, and I think in France one time.

Q You are not contending then that the blow you received on the Mason Lykes has anything to do with you losing your memory, is that right?

A I would say not, no sir. The onliest thing, when the guy hit me it made me mad and that is as much as I can --

Q Would you explain what your getting hit has to do with your losing your memory?

A No, I couldn't explain that -- no, I can't explain that. I mean, I don't know how to go about explaining it. I don't know.

Q Has that happened to you before?

A No, that has never happened to me before.

Q How about since then?

A Or after that.

Q It has happened to you after that?

A No, or after that, it has not happened.

Q Well then, how do you know it was you getting mad that caused you to lose your memory if that is the only time in your life that ever happened?

MR. WRIGHT:

I object to the form of the question.

A --

Q Is there any reason why you are not answering me, Mr. Gonzales?

A No, Mr. Kierr, there is not. And when I go out and drink I go to have fun, not to fight and usually when I am drinking -- well, I mean anytime when I am drinking I am happy -- or just having fun, so I don't think I ever have been mad since then. I might have got -- I don't know -- I would not be mad. In fact, I don't recall being out drinking and getting mad.

Q Well, do you have what could generally be called an uncontrollable temper?

A No sir. I think I have a controllable temper.

Q Is it my understanding that you are testifying when you hit Boudoin is the only time in your life you have gotten mad and -- the only time you have gotten mad?

A No sir, I have been mad many times but not drinking-- not when I am drinking, because I guess a man gets mad, gets angry practically every day sometimes.

Q That is your experience?

A Well, when you see something you are doing go wrong in your work, or your hammer slips and smashes your finger or something --

Q Are you able to control yourself when you get mad? At such times?

A Yes, sir.

Q But when you get mad if you are drinking you cannot control yourself?

A No sir, I can control myself drinking.

Q When you get mad while you are sober you do not lose your memory?

A No sir.

Q But when you get mad while you are drinking you do lose your memory?

A No sir, I would say not, no sir. That is kind of hard to answer, a man don't remember every time he got mad, he can't remember all that.

Q I think you told me the only time your memory ever blanked out on you was when you got mad while drinking or when you hit Boudoin, is that right?

MR. WRIGHT:

He said that is the only time he remembers.

A That's the onliest time I can recall of having a loss of memory like that.

Q Is there anything wrong with your memory right now?

A Not that I know of.

MR. WRIGHT:

Mr. Kierr, we have completed about four hours of the deposition now. Do you have any idea how long you are going to be?

MR. KIERR:

May we go off the record?

(At this point there was a brief discussion off the record.)

BY MR. KIERR:

Q Can you give me the number of Lykes ships you have been on?

MR. WRIGHT:

Isn't that in his service record which we have introduced?

Q I had better rephrase that question. Do you remember approximately how many Lykes ships you have been on since the Mason Lykes?

A Yes, I do.

Q How many?

A Since the Mason Lykes, let's see -- well, approximately I would say, about four, about four of the ships--

Q Have you ever been asked anything by the Lykes Company concerning the occurrence on the Mason Lykes? Have you been asked anything by the Lykes Company concerning that?

A Only last night when Mr. Wright come down and told me something, told me about it.

Q Mr. Wright came on your ship last night?

A Yes.

Q What time was that?

A About 12:00 o'clock.

Q That was shortly after the arrival of the vessel here?

A Yes.

A No, I have not.

Q What did you do before you went into the Merchant Marine?

A I was in the -- before I was in the Merchant Marine I was in the Navy.

Q Did you receive an honorable discharge or dishonorable?

A Honorable conditions discharge.

Q What was the condition?

A I missed a destroyer.

Q Where?

A In New York.

Q Were you charged AWOL?

A Yes.

Q Were you found guilty of being AWOL?

A I was.

Q Why did you missthe boat?

A I just missed it, I was late and the ship sailed. I couldn't make it back to the ship in time.

Q Was the charge being absent without leave?

A I went on a weekend pass and the ship sailed on Monday and I never got back Monday until evening and I was transferred for GC, General Court Marshal for missing ship and I plead guilty to the charge of missing the ship and I was on Hart's Island for three months and then they put me on another ship.

Q How long did you all talk?

A An hour, it was 1:00 o'clock, a whole hour. I had to pass the immigration and customs and stuff.

Q Was that the first time you have ever discussed Boudoin or the Mason Lykes' incident with anyone?

A Yes, it was.

MR. WRIGHT:

Anyone from Lykes.

Q Were you ever refused employment on any Lykes Bros. ship.

A No, I was never refused employment.

Q Particularly I refer to the ships since the Mason Lykes.

A The ships since the Mason Lykes -- I have never been refused. From the union hall I go to the doctor, pass the doctor and go aboard the ship. I mean -- I have never been rejected for no reason.

Q Did you get any medical treatment while you were aboard the Mason Lykes?

A No, I did not.

Q Or any first aid?

A No.

Q Did you get hurt while aboard the vessel?

A Did I get hurt while I was aboard the vessel? No, I never got hurt while I was aboard the vessel.

Q Did you sustain any injuries which required medication

while aboard the Mason Lykes?

A Only, I would say -- I would say no. I never received any medical attention on the Mason Lykes.

Q I said did you receive any injuries which required any medication or first aid?

A Only my chin, in the Atlantic bar that woman there, that lady there put a band aid on it.

Q Where was that?

A At the Atlantic Hotel.

Q Where?

A At Walvis Bay.

Q When was that?

A That was when I went ashore the next morning.

Q Why did she put a band aid on it?

A I don't know, she just saw it and said, "You got a bad cut there."

Q Was it bleeding?

A No, it was not bleeding, just -- so she took a piece of -- took a band aid and put -- a piece of gauze and a piece of tape, you know, and stuck it on there.

Q How long did you wear a bandage on the cut?

A I don't guess but a few hours. After that came off, I pulled it off and I never put anything else on it.

Q Did anybody aboard the ship see you with the band aid on?

A I don't know if they did or not, but if they did

they never mentioned it to me.

Q Well, did you wear a band aid on your face while you were aboard the ship any time?

A The onliest time I remember wearing a band aid was out at the Atlantic bar and I don't recall -- that's the onliest time I remember wearing a band aid.

Q Did you complain about that to anybody aboard that ship?

A No.

Q Does anybody aboard the ship know you had a cut on your chin?

A I imagine they do.

Q Who?

A Everybody in the deck department.

Q How about the officers?

A I don't know about that.

Q Did you tell them how you got the cut?

A I never was asked.

Q By any member -- you were not asked -- strike that-- you never told any member of the crew, any officer, how you got the cut?

A The officers -- I never told them. I told the crew, they asked me, "How did you get that?" Or something like that and I told them I got hurt whenever the shower clog hit me.

Q The show clog is made of wood, isn't it?

A Yes.

Q That scar, so-called, on your chin appears to have been made by a sharp instrument, don't you think, such as a knife or a piece of glass?

MR. WRIGHT:

I object to the form of the question and its self-serving statement.

Q Don't you think so?

A That I don't know.

Q Have you ever looked at it in the mirror?

A Every time I shave I have to shave around to keep from cutting there.

Q Doesn't it look like it was made by a sharp instrument rather than a blunt one?

MR. WRIGHT:

Object to the form of the question.

A Well, a shower clog, it is a square piece of wood with a strap over it, so how he hit me and how the clog landed, I don't know. I never paid no -- I never was asked about it.

Q At least, you do not disagree with me when I tell you that scar looks like a hairline scar which is almost perfectly straight and very narrow, apparently made with a sharp instrument such as a knife, razor or piece of glass. You would not disagree with that statement, would you?

A I have never paid the scar no mind. It never crossed

my mind how I got that scar.

Q I take it you do not disagree with me. May I ask you if you have any other scar on your face? How about near the corner of your right eye? Do you remember getting a scar there?

A Over here? (Indicating).

Q Yes.

A I don't remember getting a scar there.

Q How about on the left side of your chin?

A No, I never got a scar there, I have never noticed if I did.

Q You don't remember ever seeing a scar on your lower cheek on the left side? I can see it from here.

A That is a pimple -- it is a pimple.

MR. WRIGHT:

I wouldn't call it a scar, a small identation of the skin perhaps.

It is now about 3:00 o'clock. I think we better let this lady go to lunch. Or are you almost finished?

MR. KIERR:

Do you have any direct examination?

MR. WRIGHT:

I won't know until you finish.

MR. KIERR:

May we go off the record?

(At this point there was a brief discussion off the record).

MR. WRIGHT:

No, I think the record should show the length of the cross examination. I think the record should show the deposition started at quarter to 11:00 and it is now approximately 3:00 o'clock.

MR. KIERR:

Mr. Wright, I have no desire to keep the record from showing exactly how long we have been here. I suggest not encumbering the record with the colloquy between counsel. I think you know I am interested in facilitating your catching your plane, which I think leaves in two hours from now. If you care to postpone your return trip, perhaps we can take a break for those two hours and resume again tonight.

MR. WRIGHT:

Well, that is not entirely accurate. The plane leaves one hour and a half from now and in half an hour I am supposed to leave in the limousine. Now, I think you have had more than sufficient time, it now being approximately 3:00 o'clock, and having started the depositions at about quarter to 11:00, to complete your examination of the witness. However, as I said, if you are going to take much longer I would suggest we break for something to eat and return.

MR. KIERR:

The rest of my questioning will take less than five

minutes, I am willing to agree. That is, my questioning on cross--

MR. WRIGHT:

I might say this, just for the purpose, if you think there is a possibility I have some motive you do not understand in letting the deposition reflect the time element, I think it is to my advantage to show the length the witness has been here and the patience he has endured in answering our questions.

BY MR. KIERR:

Q Mr. Gonzales, have you received any letters from Lykes Bros. Steamship Company, Inc., about this matter?

A No, I have not.

Q How about from their attorneys?

A I have not.

Q Or other representatives of Lykes Bros. Steamship Company?

A I have received no letters.

Q If letters were sent to your sister's home in Moss Point, Mississippi, would they have been forwarded to you?

A I have not contacted my sister in Moss Point since about -- since 1948.

Q How far is that from New Orleans?

A Quite a ways. That is about 40 miles from Mobile, I would say. Do you know how far Mobile is from New Orleans?

Q Have you been in Mobile during that time?

and proofs of the parties and due deliberation having been had, the court now makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiff was employed aboard this vessel in the engine department in the capacity of oiler during a foreign voyage which commenced from and ended in New Orleans between the dates of September 6, 1949 and December 19, 1949. He received wages and over-time amounting to about $300.00 per month. During the same voyage the same voyage the defendant also employed a deck-maintenanceman named Manuel Gonzales.

2. There occurred an "assault upon the person of Elie J. Boudoin, oiler, by Manuel Gonzales, deck-maintenance, cn November 25, 1949, aboard ship at Walvis Bay, S. W. A." and an entry to said effect was made in the official log book of the vessel.

3. A drinking party took place aboard the vessel during the late hours of November 24, 1949 and the early hours of November 25, 1949 in the living quarters of boatswain, Robert Oswald, and the deck-maintenanceman, Jacob Pali, which was attended by them and Manuel Gonzales.

4. The master and other officers were aboard the vessel while the drinking party was in progress in the boatswain's forecastle, and one of the officers was charged with being awake and having the watch duty, which watch duty included the hourly inspection of crew's quarters. The master and other officers of the vessel did nothing to terminate the drinking party in spite of the fact it was a

Q Have you ever been found guilty of any other breach of duty while in the service?

A I don't -- In Gibraltar, we was on our way back to the States and I went ashore in Gibraltar without permission of the Master and I was given 20 days brig for it .

Q Did you get drunk on both of these occasions of getting in trouble with the Navy?

A Well, in Gibraltar I wasn't drunk wnen I left the ship and I wouldn't say I was drunk when I came back to the ship. I left the ship in the evening, about 8:00 o'clock and got back to the ship about 12:30 and I wasn't drunk. I drank a few beers is all.

Q Were you charged with anything else in the Navy?

A That is all.

Q Have you been found guilty of any other misdemeanor or crime which we have not discussed today?

A No, nothing else.

Q Have you ever been arrested or charged with anything beside the things we discussed?

A I have -- no, I have never been arrested or charged with anything other than what we discussed.

Q Have you ever lived for any length of time, such as several months, in any city besides New Orleans?

A Not -- several months,you say?

Q Yes.

A No, I have -- I never stayed on the beach over a

couple or three weeks.

Q Did you or did you not tell the officers aboard the ship that you were struck on the chin by Boudoin?

A Did I tell the officers on the ship that?

Q Yes.

A No, not that I know of at that time. No, I don't think I mentioned it to them.

Q These facts which you allege describe what happened, namely Boudoin invited you in for a drink and hit you, you have never told anyone until you spoke to Mr. Wright this morning?

A I have never discussed with anyone but Mr. Wright --

Q This morning?

A Last night.

Q Well, at midnight.

A Yes sir.

Q That is the first time you have told anyone about these facts?

A That's the first time I discussed it.

MR. KIERR:

That is all.

REDIRECT EXAMINATION

BY MR. WRIGHT:

Q Did you tell it to the union officials at the end of the voyage?

A I told it to the patrolman --

MR. KIERR:

I object to the leading form of the question and further object because counsel is seeking to, obviously is seeking to impeach his own witness.

Q Did you have any union official ask you what happened between you and Boudoin when the voyage ended?

MR. KIERR:

Same objection.

MR. WRIGHT:

You have reserved your objections until the trial. Let me ask him this, I only have just one question to ask the man.

Q Did they ask you what happened between you and Boudoin?

A Yes sir.

Q Did you tell them what you told us today?

MR. KIERR:

Same objection.

A I told them what I told Mr. Kierr here.

Q Did the union bring any charges against you?

A No.

MR. KIERR:

I further object to all questions including this one, because they are leading.

Q Did you make any objection to logging at the time of the payoff on board ship?

A Yes, I did. On the weekends I was logged Saturday and Sunday, so I protested that.

Q Were you examined by a doctor before going on the various ships you had sailed on since and before the Mason Lykes?

A Yes, sir.

Q Were you examined by a doctor before going on the Mason Lykes?

A Yes sir.

Q Were you passed by a doctor before going aboard the Mason Lykes?

A Yes, I was.

MR. WRIGHT:

That is all.

RECROSS EXAMINATION

BY MR.KIERR:

Q This much we are sure, that whatever happened on the Mason Lykes in Walvis Bay, that was the time when you had had enough?

MR. WRIGHT:

That is beyond the scope of redirect and I object.

MR. KIERR:

All right.

A Well, I would say that I -- I had enough, but I don't get that "had enough" in there.

Q You were drunk, were you not?

A I was pretty-- pretty drunk, yes, sir.

MR. KIERR:

That is all.

(There being no further questions the taking of the deposition was thereupon concluded.)

...ooOoo...

C E R T I F I C A T E

STATE OF FLORIDA

COUNTY OF HILLSBOROUGH

I, Dorothy B. Adams, a Notary Public in and for the State of Florida at Large, do hereby certify that the foregoing deposition of Manuel Gonzales was taken before me, pursuant to notice, copy of which is attached hereto, on the 2nd day of April, 1953, beginning at 10:45 a. m., at the offices of Macfarlane, Ferguson, Allison and Kelly, First National Bank Building, Tampa, Hillsborough County, Florida, in that cause now pending in the District Court of The United States, Eastern District of Louisiana, New Orleans Division, in which Elie J. Boudoin is plaintiff and in which Lykes Brothers Steamship Company, Inc., is defendant; that at said time and place I was attended by Mr. Raymond H. Kierr, of counsel for the plaintiff, and Mr. William E. Wright, Associate of the firm of Terriberry, Young, Rault & Carroll, of counsel for the defendant; that said witness was duly sworn by me to tell the truth, the whole truth and nothing but the truth, and was thereupon

examined and testified, and that his said testimony was recorded by me truly and accurately in shorthand and that I thereafter had made under my direct supervision a true, full and accurate transcription thereof upon the typewriter, which transcription is contained in the foregoing pages numbered 1 to 97 inclusive.

I further certify that by oral stipulation and agreement of counsel for the respective parties, as hereinabove set forth, the reading of the deposition and the signing thereof by the deponent was waived, said waiver being assented to and concurred in by the witness; that the certification and sealing of said deposition was also waived and that the original of said deposition was retained by me to be forwarded to the Clerk of said Court.

I further certify that I am not of counselnor solicitor to either of the parties of this cause, and that I am not related to nor employed by either of said parties or any of their said counseland that I am not interested in the event of said cause.

In witness whereof I have hereunto signed my name and affixed my notarial seal at Tampa, Florida, this 10th day of April, 1953.

s/ Dorothy B. Adams
Notary Public
State of Florida at Large

(S E A L)

My commission expires March 12, 1955.

...ooOoo...

SUPPLEMENTAL AND AMENDED COMPLAINT

(Number and title omitted) (Filed: May 6, 1953)

The supplemental and amended complaint of Elie J. Boudoin, with respect, represents:

I.

A jury is waived in this action with the concurrence of the defendant.

II.

Plaintiff has received maintenance from the defendant in the sum of $258.00, through January 31, 1950, in connection with his injuries which are the subject of this action; he is due additional maintenance in the sum of $1,000.00.

III.

Plaintiff's injuries and residuals thereof have been more serious, and worse since the filing of the original complaint, and he is now disabled from returning to sea and his earning capacity is reduced, all of which is permanent and to his damage in the sum of $44,000.00.

IV.

Plaintiff maintains this action under the Jones Act, 46 U.S.C.A. 688, and under the General Maritime Law, including that of the warranty of seaworthiness.

V.

Plaintiff is entitled to legal interest from date of judicial demand.

WHEREFORE, plaintiff prays for leave to file the above

supplemental and amended complaint, and for judgment against defendant covering damages and maintenance in the sum of $45,000.00, and interest from date of judicial demand, and for all costs, and all general and equitable relief.

s/ Raymond H. Kierr
RAYMOND H. KIERR
1746 National Bank of Commerce Bldg., New Orleans 12, La.

O R D E R

Let the foregoing supplemental and amended complaint be filed.

New Orleans, Louisiana, May 6th, 1953.

s/ J. SKELLY WRIGHT
United States District Judge

...ooOoo...

OPINION OF THE COURT

(Number and title omitted) (Filed: May 15,1953)

Raymond H. Kierr
Samuel C. Gainsburgh
Attorneys for Plaintiff

Terriberry, Young, Rault and Carroll
Andrew R. Martinez
William E. Wright,
Attorneys for Defendant

WRIGHT, District Judge:

Plaintiff, an American seaman, is suing the defendant as the owner and operator of an ocean freighter known as the MASON LYKES, on which vessel he was formerly employed. Plaintiff claims to have been assaulted by a fellow seaman aboard the vessel and bases his claim for recovery on allegations of negligence and unseaworthiness. The issues of fact and law having come on to be heard on the pleadings

on further suggesting to the court that defendant desires a stay of execution of said judgment pending the Court's determination of these motions, and

ON FURTHER SUGGESTING TO THE COURT that defendant is financially responsible to respondent to the judgment which was rendered and any costs defendant may be liable for in connection therewith, including additional costs defendant may be held responsible for in connection with said motion, and

IT IS RESPECTFULLY SUBMITTED that the execution of the judgment should be extended indefinitely and pending the determination of the said motions,

IT IS ORDERED, ADJUDGED AND DECREED that the execution of or any proceedings to enforce the court's judgment herein is hereby stayed indefinitely without the filing of security pending the outcome of defendant's motions to alter and/or amend the judgment, and/or a new trial.

New Orleans, Louisiana, May 28th, 1953.

(Sgd) J. Skelly Wright
U. S. District Judge

s/ Terriberry, Young, Rault
& Carroll

s/ Wm. E. Wright
Terriberry, Young, Rault & Carroll
Attorneys for Defendant
Lykes Bros. Steamship Co., Inc.
825 Whitney Building
New Orleans 12, Louisiana

...oOo...

MOTION TO OBTAIN ORDER DIRECTING
PLAINTIFF TO ELECT

(Number and title omitted) (Filed: May 29, 1953)

NOW COMES Lykes Bros. Steamship Co., Inc. through its attorneys, Terriberry, Young, Rault & Carroll, and

violation of shipboard regulations to bring aboard ship or to consume aboard ship spiritous liquors.

5. During the course of the party a large quantity of liquor was consumed. Each of the principals at the party, namely, the boatswain, Gonzales and the deck-maintenance-man drank almost a full fifth of whiskey. A few drinks were consumed by other members of the crew who dropped in on the party.

6. The plaintiff had retired to bed in his quarters about 5:00 p.m. on November 24, 1949. He slept until about 1:30 the following morning, at which time he got up and went to the mess hall for a sandwich. On his way back to his own room the plaintiff passed the boatswain's room where he was offered a drink. He refused the offer and returned to his room.

7. Between 15 and 30 minutes later, while plaintiff was asleep or almost asleep in his bed, Manuel Gonzales came into the plaintiff's room and took a bottle of brandy from under the plaintiff's bed. When plaintiff was startled in the semi-darkness by the shape and person of Manuel Gonzales close at his bed, the plaintiff accosted the intruder, and Gonzales attacked the plaintiff, striking him on the back of the head with the bottle which he, Gonzales, had taken from under the plaintiff's bed.

8. Manuel Gonzales was in a drunken and disorderly condition when he intruded into plaintiff's room shortly before 2:00 a. m. for the apparent purpose of stealing a bottle of liquor.

9. A few minutes after Gonzales struck plaintiff with the bottle Gonzales appeared in the passageway in the vicinity of plaintiff's room with a large knife which he intended to use on the plaintiff. The knife was taken from him by Andrew Brown, fireman-water tender and roommate of the plaintiff and Harry Brock, third mate of the vessel.

10. As a result of the blow which was struck by Manuel Gonzales, which blow caused his weapon, the full bottle of liquor, to break upon the plaintiff's head, the plaintiff sustained concussion and lacerations. The plaintiff received medical treatment from a doctor who was a passenger aboard the vessel. The treatment included the tieing off of severed blood vessels, the placing of 18 stitches in the deep cuts at the back of the plaintiff's head and cauterization of the wounds.

11. While the plaintiff was receiving medical treatment in the ship's hospital, Manuel Gonzales was outside the hospital door creating a disturbance. During that time, which was shortly after the assault, Manuel Gonzales stated that he was responsible for the plaintiff's condition, and that he wanted to give some of his blood for a transfusion. He called epithets into the sick-bay at the plaintiff. He refused to permit the mate on watch, Mr. Brock, to enter the room and threatened him with bodily injury.

12. About 8:00 a. m.on November 25, 1949, Manuel Gonzales was ordered to the master's cabin and there refused to make a statement relative to his affair with the

plaintiff, and also refused his signature to the effect that he would not make a statement.

13. Thereafter Manuel Gonzales was sent to the ship's hospital to clean it, and, instead of completing the job, he left the vessel against orders.

14. About 1:00 p.m. on November 25, 1949, Manuel Gonzales returned to the vessel with two bottles of liquor, at which time the master apprehended him, took the bottles away, and placed him in irons. At the same time the master requested the shore police to take Manuel Gonzales into custody for safekeeping until the vessel sailed. The police declined to do so unless he was left behind for a court hearing several days later.

15. Manuel Gonzales was logged for failing to obey orders, and the master ordered that he pay all overtime necessary while the plaintiff was relieved from duty.

16. On the morning of November 26, 1949, Manuel Gonzales left the vessel without leave and did not return until the morning of November 28, 1949; he was logged for disobedience of orders; the master further ordered that Manuel Gonzales should be charged with the costs of transportation to and from the hospital and for x-rays.

17. On December 7, 1949 there was imposed on Manuel Gonzales the following fines: two days' pay for being absent without leave on November 26, 1949 and November 27, 1949; four days' pay for disobedience of orders in leaving ship after shore leave denied at Walvis Bay.

18. On the return of the MASON LYKES to the United States Manuel Gonzales was fired by the captain. Since that time, however, he has sailed aboard several of defendant's vessels, including one at the time of trial.

19. Manuel Gonzales was a person of dangerous propensities and proclivities during the time he was employed aboard the Steamship MASON LYKES, including the time of his assault upon the plaintiff and prior thereto.

20. Manuel Gonzales was a person of violent character, belligerent disposition, excessive drinking habits, disposed to fighting and making threats and assaults.

21. Following his injuries, plaintiff was relieved from duties during the remainder of the voyage and remained under medical observation and treatment aboard the vessel. During that time he suffered from occasional headaches and dizziness and was administered medicine at intervals to ease pain, all as noted by the master in his statement attached to log entries.

22. Plaintiff was admitted to the United States Marine Hospital in New Orleans as an outpatient on December 19, 1949, and as a hospital patient on February 15, 1950. He was discharged as fit for duty on February 21, 1950. The diagnosis included healed scars of the posterior head and post-traumatic headaches. The plaintiff was also examined by private physicians. There was no treatment for his complaints other than rest and medication to relieve headaches.

23. The plaintiff did not return to work until August

1950, when he obtained a job with the Municipal Sanitation Department, which he kept for about five months. Later the plaintiff returned to his occupation as a merchant seaman. He made two sea voyages during 1951, one for two months and the other for four months, and a third and final sea voyage during 1952 for a period of one month.

24. The plaintiff testified that he has stopped going to sea because he is unable to perform his duties properly and comfortably. He complains that his headaches, dizziness and nervousness are increased and made worse by heavy labor and confinement aboard ship, the movement of the vessel at sea, and the heated surroundings in the engine-room.

25. The medical evidence supports the plaintiff's testimony to the extent that some neurological tests applied to the plaintiff have been positive, indicating brain damage of some kind. Plaintiff has failed to prove, however, to a reasonable certainty that the assault on him by Manuel Gonzales is responsible for his neurological condition.

26. The plaintiff received from the defendant maintenance at the rate of $6.00 per day covering a period of 43 days from December 20, 1949 to January 31, 1950, representing a total of $258.00. As a result of his injuries received aboard the MASON LYKES, however, he was not fit for duty until February 21, 1950.

CONCLUSIONS OF LAW

1. Jurisdiction of this action is properly laid under the Jones Act and the general maritime law.

2. The warranty of seaworthiness is a kind of liability without fault in which knowledge of the circumstances creating the unseaworthiness is immaterial. Seas Shipping Company v. Sieracki, 328 U. S. 85; Work v. Leathers, 97 U.S. 379; The Edwin I. Morrison, 153 U. S. 199, 210; Mahnich v. Southern S. S. Co., 321 U. S. 96, 100; The H. A. Sacndrett 87 F. 2d 708, 710; Balado v. Lykes Bros. S. S.Co., 179 F. 2d 943, 945.

3. A shipowner's warranty of seaworthiness covers the competence of the crew as well as the integrity of the vessel. The Osceola, 189 U. S. 158; Re Pacific Mail Steamship Company, 130 F. 76; The Rolph, 299 F. 52; Spellman v. American Barge Line, 176 F. 2d 716; Keen v. Overseas Tankship Corp., 194 F. 2d 515.

4. Applied to a seaman, such a warranty is not that the seaman is competent to meet all contingencies, but that he is equal in disposition and seamanship to the ordinary men in the calling. Keen v. Overseas Tankship Corporation, supra.

5. Manuel Gonzales was during the voyage in question not equal in disposition and seamanship to the ordinary men in the calling of seamen and his short-coming in this regard was a proximate cause of plaintiff's injuries.

6. It is the duty of officers of a vessel to maintain

proper discipline among the crew and, particularly, to suppress those disorderly acts of seamen which may reasonbly be expected to result in injury to members of the crew. Jensen v. United States, 184 F. 2d 72, 1950 A.M.C. 1797; Koehler v. Presque-Isle Transportation Company, 141 F.2d 490, 1944 A.M.C. 432.

7. The failure of the officers of the vessel to suppress the seamen's drinking party aboard ship which they knew or should have known had been going on for several hours and which they should have anticipated might lead to an assault by one seaman on another is negligence for which the defendant is liable under the Jones Act.

8. As a result of its breach of warranty of seaworthiness and the negligence of its officers, the defendant is liable to the plaintiff in the amount of $1500 for his injuries and $600 for loss of wages. In addition, the plaintiff is entitled to maintenance from February 1, 1950 to February 21, 1950.

New Orleans, Louisiana, May 14th, 1953.

s/ J. SKELLY WRIGHT
United States District Judge

...ooOoo...

J U D G M E N T

(Number and title omitted) (Filed: May 22, 1953)

This cause came on for trial at a former day before the Court, without the intervention of a jury, upon the pleadings, evidence, and testimony offered on behalf of the respective parties; and after hearing argument of

counsel, the matter was submitted and the Court took time to consider;

Now, after due consideration thereof, and for the written reasons of the Court on file herein;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the plaintiff, Elie J. Boudoin, and against the defendant, Lykes Bros. Steamship Company, Inc., in the amount of $1,500.00 for his injuries, $600.00 for his lost wages, and $126.00 as maintenance from February 1, 1950 to February 21, 1950, together with all costs.

New Orleans, Louisiana, May 22nd, 1953.

s/ J. SKELLY WRIGHT
United States District Judge

...ooOoo...

MOTION AND ORDER TO EXTEND THE STAYING OF JUDGMENT WITHOUT POSTING SECURITY

(Number and title omitted) (Filed: May 29, 1953)

ON MOTION of Lykes Bros. Steamship Co., Inc., through its attorneys, Terriberry, Young, Rault & Carroll, and

ON SUGGESTING TO THE COURT that judgment herein was entered on May 22, 1953 holding defendant liable to the plaintiff in the amount of TWO THOUSAND TWO HUNDRED TWENTY-SIX AND NO/100 ($2,226.00) DOLLARS, and

ON FURTHER SUGGESTING TO THE COURT that defendant is filing simultaneously with the filing of this motion, pleadings requesting the court to alter and amend the judgment and findings as provided by Rules 52 and 59, and,

NOTICE OF STATEMENT OF POINTS RELIED ON

(Number and title omitted) (Filed July 22, 1953)

SIRS:

Please take notice that the plaintiff, Elie J.Boudoin, will rely upon the following points in support of his appeal:

1. That the amount of damages awarded by the trial court is inadequate, and should be increased.

2. That the term of maintenance determined by the trial Court is insufficient and should be extended, and increased to $8 00 per day.

s/ Raymond H. Kierr
Raymond H. Kierr
Attorney for Plaintiff
1746 National Bank of Commerce Bldg.
New Orleans 12, Louisiana

...ooOoo...

DESIGNATION OF POINTS TO BE RELIED UPON BY APPELLANT, LYKES BROS. STEAMSHIP CO., INC., ON APPEAL TO FIFTH CIRCUIT COURT OF APPEALS

(Number and title omitted) (Filed: July 23, 1953)

Lykes Bros. Steamship Co., Inc. will rely on the following points in its appeal to the Fifth Circuit Court of Appeals:

1. The so-called "doctrine of unseaworthiness", as mentioned in the Keen Case should be rejected.

2. Lykes Bros. Steamship Co., Inc. is not liable (assuming the facts found by the District Court) and as a matter of law, judgment under the Jones Act and for unseaworthiness should be in its favor.

3. Alternatively, Lykes Bros. Steamship Co.,Inc.

ON SUGGESTING TO THE COURT that the judgment is contrary to the law because it holds defendant liable under two causes of action when only one recovery can be made;

IT IS RESPECTFULLY REQUESTED that the plaintiff, as a matter of law, must be forced to elect under which cause of action he seeks recovery; and

CONSEQUENTLY, defendant requests the court to enter an order granting the plaintiff 10 days in which to file an election setting forth under which cause of action he intends to base his claim of recovery against defendant, Lykes Bros. Steamship Co., Inc.

s/ Terriberry, Young, Rault & Carroll

s/ Wm.E. Wright
Terriberry, Young, Rault & Carroll, Attorneys for Defendant, Lykes Bros. Steamship Co., Inc., 825 Whitney Bldg., New Orleans 12, La.

...ooOoo...

MOTION TO ALTER AND/OR AMEND JUDGMENT AND/OR AMEND FINDINGS OF FACT, AND/OR NEW TRIAL

(Number and title omitted) (Filed: May 29, 1953)

NOW COMES Lykes Bros. Steamship Co.,Inc. through its attorneys, Terriberry, Young, Rault & Carroll, and moves the Court for an order setting aside the judgment herein, and for a new trial for the following reasons:

1. The judgment is contrary to the Findings of Fact - law and evidence.

2. The Findings of Fact are contrary to the evidence.

3. Some additional Findings of Fact should be made.

4. The Findings of Fact do not support the conclusion of law that the defendant was negligent.

5. The Findings of Fact do not support the conclusion of law that the defendant's vessel was unseaworthy.

6. The judgment is contrary to the law both with respect to alleged negligence and alleged unseaworthiness.

7. Alternatively, the plaintiff cannot recover under both the doctrines of unseaworthiness and negligence under the Jones Act.

WHEREFORE, defendant prays that after due proceedings had the foregoing motions be granted; and for all general and equitable relief.

s/ Terriberry, Young, Rault and Carroll

Wm. E. Wright
Terriberry, Young, Rault and Carroll
Attorneys for Defendant
Lykes Bros. Steamship Co. Inc.
825 Whitney Bank Bldg.
New Orleans 12, Louisiana

...ooOoo...

HEARING ON MOTION OF DEFENDANT TO ALTER and/or AMEND JUDGMENT AND ORDER DENYING SAME

Minute Entry June 24th, 1953 Wright, J:
(Number and title omitted)

This cause came on this day to be heard on motion of defendant, to alter and/or amend judgment, etc.

Present: William E. Wright,
Attorney for defendant;

Raymond H. Kierr,
Attorney for plaintiff;

After hearing argument of counsel for the defendant;

IT IS ORDERED that the motion of defendant to alter and/or amend judgment, etc., be, and the same is hereby, DENIED.
J.S.W.

NOTICE OF APPEAL

(Number and title omitted) (Filed: June 30, 1953)

Notice is hereby given that Lykes Bros. Steamship Co., Inc., defendant, hereby takes a supersedeas appeal to the United States Court of Appeals for the Fifth Circuit from the judgment entered in this action on May 14, 1953 and filed on May 15, 1953.

TERRIBERRY, YOUNG, RAULT & CARROLL

S/ BY: Wm. E. Wright
Attorneys for defendant
Lykes Bros. Steamship Co. Inc.
825 Whitney Bank Building
New Orleans 12, Louisiana

...ooOoo...

MOTION FOR STAY OF EXECUTION WITHOUT THE NECESSITY FOR FIXING A SUPERSEDEAS BOND

(Number and title omitted) (Filed: June 30, 1953)

Now into Court, through undersigned counsel, Terriberry, Young, Rault & Carroll, comes defendant, Lykes Bros. Steamship Co., Inc. and moves the Court;

To stay the execution of the judgment herein rendered without the necessity of posting a supersedeas bond for the purposes of appeal as set out in Rule 62 (d).

IT IS ORDERED, ADJUDGED and DECREED that there be a stay of execution of the judgment herein entered without the necessity of posting a supersedeas bond for the purposes of appeal as set out in Rule 62 (d).

New Orleans, Louisiana, June 30th, 1953.

s/ HERBERT W. CHRISTENBERRY
UNITED STATES JUDGE

TERRIBERRY, YOUNG, RAULT & CARROLL

BY: s/ Wm. E. Wright
Attorneys for Defendant

NO OBJECTION:

RAYMOND H. KIERR

BY: s/ Raymond H. Kierr
Attorney for plaintiff

...ooOoo...

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

(Number and title omitted) (Filed: July 10, 1953)

Pursuant to Rule 75 of the Federal Rules of Civil Procedure defendant, Lykes Bros. Steamship Co. Inc., designates the following portions of the record to be included in the record to be sent to the Fifth Circuit Court of Appeals in connection with defendant's appeal of this case.

1. The complaint.

2. The Supplemental Complaint.

3. The Answer.

4. Motion and order naming Terriberry, Young, Rault & Carroll counsel of record.

5. Minute entries of Trial dated March 19, 20, and 21, 1953.

6. Court's Opinions.

7. Court's Judgment.

8. Motion and Order staying Judgment.

9. Motion requiring plaintiff to elect.

10. Motion to alter, amend, etc. Judgment.

11. Order denying Motions to elect, alter, etc.

12. Notice of Appeal.

13. Motion and Court Order permitting appeal without Bond.

14. All Exhibits admitted into evidence (sent to Fifth Circuit Court in original form).

15. Trial Reporters Transcript.

16. All Depositions or, more particularly, the following:

(a) Deposition of Townsend.

(b) Deposition of Staggers.

(c) Deposition of Gonzales.

s/ Terriberry, Young, Rault & Carroll

s/ Wm. E. Wright
Terriberry, Young, Rault & Carroll
Attorneys for Defendant
Lykes Bros. Steamship Co. Inc.
825 Whitney Bank Building
New Orleans 12, Louisiana

...ooOoo...

DESIGNATION OF PORTIONS OF REPORTERS TRANSCRIPT TO BE INCLUDED WITH RECORD TO FIFTH CIRCUIT COURT OF APPEALS

(Number and title omitted) (Filed: July 10, 1953)

Defendant, Lykes Bros. Steamship Co., Inc., requires that the following testimony which was taken in open Court at the trial be transcribed by the Court Reporter and included in the Record to be sent to the Fifth Circuit Court of Appeals.

1. Testimony of Mrs. Eddie V. Cooksey.

2. Testimony of Miss Clelie Mall.

3. Testimony of John Buckley.

4. Testimony of Bernard Foster.

6. Testimony of Elie J. Boudoin.

7. Testimony of Clyde Biggers.

8. Testimony of Hugh Flattery.

9. Testimony of Harry Beyer.

Terriberry, Young, Rault & Carroll

s/ Wm. E. Wright
Terriberry, Young, Rault & Carroll
Attorneys for Defendant
Lykes Bros. Steamship Co., Inc.
825 Whitney Bank Bldg.
New Orleans 12, Louisiana

...ooOoo...

APPELLEE'S DESIGNATION OF CONTENTS OF RECORD ON APPEAL

(Number and title omitted) (Filed: July 16, 1953)

Pursuant to Rule 75(a) and (b) of the Federal Rules of Civil Procedure, Plaintiff-Appellee, Elie J. Boudoin , designates the following portions of the record of the trial of this case for inclusion in the record to be transmitted to the Fifth Circuit Court of Appeal:

1. All log books, their contents, attachments and appendages, including:

   a. Statement of Elie J. Boudoin.
   b. Statement of Harry F.Brock.
   c. Statement of Clarke Staggers.
   d. Statement of Robert G. Williamson.
   e. Statement of Andrew M. Brown.
   f. Statement of Ernest Coutee.
   g. Statement of Manuel Gonzales.
   h. Statement of George P. Townsend.

2. Transcript of the testimony of Dr. Jose Garcia-Oller;

3. Transcript of the testimony of Dr. Howard H. Karr;

4. Photostatic copy of the record of the United States Public Health Service Hospital in New Orleans in lieu of said record in its original form.

s/ Raymond H. Kierr
Attorney for Plaintiff-Appellee

...ooOoo...

MOTION AND ORDER TO TRANSMIT DOCUMENTS
IN THE ORIGINAL TO THE COURT OF APPEAL

(Number and title omitted) (Filed: July 16, 1953)

ON MOTION of Elie J. Boudoin, Plaintiff-Appellee, through his undersigned counsel, and

ON SUGGESTING to the Court that the following exhibits offered and admitted or excluded as evidence on the trial of this cause should be transmitted to the Court of Appeal in the original form:

All log books, their contents, attachments and appendages, including:

1. Statement of Elie J. Boudoin.
2. Statement of Harry F. Brock.
3. Statement of Clarke Stagers;
4. Statement of Robert G. Williamson;
5. Statement of Andrew M. Brown;
6. Statement of Ernest Coutee;
7. Statement of Manuel Gonzales;
8. Statement of George P. Townsend;

IT IS ORDERED that such exhibits filed in this case be made part of the record and forwarded to the Court of Appeal in their original form.

s/ HERBERT W. CHRISTENBERRY
UNITED STATES DISTRICT JUDGE

Respectfully submitted

s/ Raymond H. Kierr
Attorney for Plaintiff-Appellee

...ooOoo...

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT

(Number and title omitted) (Filed: July 22, 1953)

Pursuant to Rule 73 of the Federal Rules of Civil Procedure, notice is hereby given that Elie J. Boudoin, plaintiff herein, hereby appeals to the United States Fifth Circuit Court of Appeal from the judgment entered in this action on May 14, 1953 and filed on May 15, 1953.

s/ Raymond H. Kierr
Raymond H. Kierr
Attorney for plaintiff
1746 National Bank of Commerce Bldg
New Orleans, Louisiana

...ooOoo...

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

(Number and title omitted) (Filed: July 22, 1953)

Pursuant to Rule 75 of the Federal Rules of Civil Procedure, Elie J. Boudoin plaintiff here, designates the following portion of the record to be included in the record to be transmitted to the Fifth Circuit Court of Appeal in connection with plaintiff's appeal, or cross-appeal, in this case:

All portions heretofore designated by the parties hereto, in the original form or other form and manner compiled for the appeal taken herein by Lykes Bros.Steamship Company, Inc.

s/ Raymond H. Kierr
Raymond H.Kierr
Attorney for plaintiff
1746 National Bank of Commerce Bldg.
New Orleans, Louisiana

...ooOoo...

is not liable even assuming that the Keen Case is followed.

4. Alternatively, the findings of fact and conclusions of law as set out in Lykes Bros. Steamship Co. Inc.'s Motion to Alter the Judgment, etc., were improper and should be corrected, and, in addition, additional findings of fact and conclusions of law should be made.

5. Alternatively, the plaintiff cannot recover under both the doctrine of unseaworthiness and negligence and should have been forced to elect which one he was proceeding under.

6. More particularly, Lykes Bros. Steamship Co., Inc. is relying upon all of the arguments as presented in its Motion to Alter and/or Amend the Court's finding of fact. The same points will be raised before the Appellate Court.

s/ Terriberry, Young, Rault & Carroll
s/ Wm. E. Wright
Terriberry, Young, Rault & Carroll
Attorneys for Lykes Bros. Steamship Co., Inc., New Orleans, La.

...ooOoo...

CLERK'S CERTIFICATE

I, A. DALLAM O'BRIEN, JR., Clerk of the United States District Court for the Eastern District of Louisiana, do hereby certify that the foregoing 499 pages (Volume I and Volume II) to contain a true and correct copy of the record in the case entitled "ELIE J. BOUDOIN -versus - LYKES BROTHERS STEAMSHIP COMPANY, INC." No. 3532 of the Civil Action Docket of this Court, as made up in accordance with the Designation of Contents copied herein.

WITNESS my hand and the seal of said Court at the City of New Orleans, Louisiana, this 20th day of September, A. D. 1953.

A. DALLAM O'BRIEN, JR., Clerk

BY: Andrew J. Bacon
Deputy Clerk

* * * * *
* * * *
* * *
* *
*

[fol. 501] Minute Entry—Argument and Submission—February 25, 1954

[Omitted in printing.]

[fol. 502] In the United States Court of Appeals for the Fifth Circuit

No. 14765

Lykes Bros. Steamship Co., Inc., Appellant-Appellee,

versus

Elie J. Boudoin, Appellee-Appellant

(And Reverse Title)

Appeals for the United States District Court for the Eastern District of Louisiana

(March 26, 1954)

Before Hutcheson, Chief Judge, and Holmes and Borah, Circuit Judges

Opinion—Filed March 26, 1954

Hutcheson, Chief Judge: This is an appeal by the defendant from a final judgment entered in plaintiff's favor in an action at law brought by a seaman for injuries inflicted upon him by another seaman and tried to the court [fol. 503] upon a waiver of jury. The plaintiff also has attempted belatedly to appeal because of inadequacy, but, since plaintiff has been paid the amount of the award for maintenance and cure, and we are holding that no case for damages was made out, it will not be necessary to notice his appeal.

Both of the seamen were unlicensed crew members. Neither had supervisory control over the other, and the assault was unconnected with the business of the ship or the respondent steamship company.

The plaintiff was employed aboard the defendant's SS

Mason Lykes in the capacity of oiler during a foreign voyage which commenced from, and ended in, New Orleans, between the dates of September 6, 1949, and December 19, 1949. During the late hours of November 24, 1949 (Thanksgiving night) and early hours of November 25, 1949, three unlicensed crew men, off duty and having no work to perform until the next morning, were in the forecastle of the boatswain talking and having drinks. One of the men was Manuel Gonzales, the assailant involved in this case.

The plaintiff, Elie Boudoin, had been drinking ashore on the afternoon of November 24th, and had gone to bed at about 5:00 P. M. that day. About 2:00 A. M. on the morning of November 25th, while the plaintiff was asleep or almost asleep in his bed, Manuel Gonzales left the boatswain's room and went into the room of the plaintiff and attempted to take a bottle of brandy from under the plaintiff's bed. When the plaintiff was startled in the semi-darkness by the shape and person of Manuel Gonzales close to his bed [fol. 504] he accosted Gonzales, and Gonzales struck him on the back of the head with the bottle which he, Gonzales, had taken from under plaintiff's bed. As a result of the blow on the head, the plaintiff suffered personal injuries for which the lower court awarded damages and maintenance. The maintenance part of the judgment has been paid, and this appeal concerns only the plaintiff's right to recover damages.

The district judge held the shipowner to an absolute warranty of seaworthiness in respect of the disposition of the members of the vessel's crew, which, as applied to assault cases, he declared required that each seaman be "equal in disposition to the ordinary men of the calling". Applying this standard, he held the defendant liable to the plaintiff under the General Admiralty Law because the assailant, Manuel Gonzales, was not, during the voyage in question, "equal in disposition to the ordinary men of the calling."[1] In addition, he held the officers of the ship negligent in not anticipating that some such trouble as occurred would, or might, occur, and in not preventing it by breaking up the party.

[1] Boudoin v. Lykes Bros. SS Co., 112 Fed. Supp. 177

Appealing from the decision and judgment, the respondent is here insisting that in so finding and holding, the district judge erred and his decree based thereon must be reversed.

In opposition to the district judge's conclusion that the presence of Gonzales on board the SS Mason Lykes made it unseaworthy, it vigorously presents these views:

> "By long and well established jurisprudence, a vessel's warranty of seaworthiness, applied to assaults [fol. 505] committed by unlicensed crew members, means that the shipowner is liable only if the assailant possessed vicious proclivities based upon a number of assaults, vicious in nature, and occurring so that the ship's officers knew or should have known the assailant's disposition. In fact, prior to the case of Keen v. Overseas Tankship Corporation, 1952 AMC 241, 194 F(2) 515 (CCA 2nd) on which the district judge relied, no court had gone to the length of holding a shipowner liable in assault cases involving unlicensed crew members when the assailant did not possess known vicious traits."

Arguing in support of these views, exhaustively reviewing the jurisprudence, and quoting from, and analyzing decisions[2] written before and after the Keen case, it concludes its argument thus:

> "These authorities establish clearly that a shipowner is not to be held liable for an assault unless: (1) it is committed by a superior on a subordinate in carrying out the ship's work; or (2) the assailant possessed know vicious characteristics."

---

[2] The Rolph, 299 Fed. 52; Kyriakos v. Foulandris, 151 F(2) 132; Lykes Bros. Steamship Co., Inc. v. Grubaugh, 129 F(2) 387; Brailas v. Shephard Steamship Co., 152 F(2) 849; Kable v. U. S., 169 F(2) 90; Yukes v. Globe Steamship Corp. 107 F(2) 888; The Law of Seamen, Norris Vol. 2 (1962); E. W. Ward, Jr., 20 Fed. 702; Hurley v. The Lizzie Frank, 31 Fed. 477; Cf. Jones v. Lykes Bros., 204 F(2) 815.

Appellant points to the absence from the findings of the essential finding that prior to the assault the shipowners or the officers of the ship knew or had reason to know, that Gonzales had exhibited, or was possessed of known vicious [fol. 506] characteristics and to the complete absence from the record of any evidence which would support such a finding. So pointing, appellant insists that, under the established principles which, upon the authority of the Keen case were departed from by the district judge, appellant is not and cannot be made, liable on the theory advanced below that Gonzales' presence on board rendered the ship unseaworthy.

On the issue of negligence on the part of the ship's officers in not putting an end to the drinking on the night of the assault, on which issue the district judge, citing *Koehler* v. *Presque Isle Trans. Co.*, 141 F(2) 490, and *Jensen* v. *U. S.*, 184 F(2) 72, also found for plaintiff, appellant concedes that it is the duty of officers to suppress disorders and conduct which they know or ought to know of, which may be reasonably expected to result in injury to crew members. It insists, though, that the record affords no basis for the finding that within the principle for which these cases stand, the ship's officers knew or should reasonably have anticipated that an incident of the kind and with the consequences shown here would be likely to occur, and that the failure to prevent it was actionable negligence.

Recognizing that the district judge has found, in Finding No. 19, that Gonzales was a person of dangerous propensities and proclivities, during the time he was employed aboard the SS Mason Lykes, and in Finding No. 20, that he was a person of violent character, belligerent disposition, excessive drinking habits, and disposed to fighting and making threats and assaults, it vigorously asserts that [fol. 507] the record does not furnish support for this finding, except as it is based upon the assault in this case.[2]

[2] In support, it points to the record, Tr. p. 277, 325, 36[illegible] and 363, showing that, excluding the instant case, he was never guilty of an assault aboard the Mason Lykes or any other vessel and that he was on the Mason Lykes several months before the involved incident. He has never been charged or investigated by the United States Coast Guard for misconduct, assaults, or fights. (Tr. 380) He has been

It further insists that, assuming that the hearsay evidence of the plaintiff, as to Gonzales' propensity for fighting, is sufficient to show that the plaintiff believed that he had that propensity, there is no evidence to show that the officers knew that he had it, and none to show that they knew, or ought to have known, that it was probable or likely that he would leave his companions in the boatswain's quarters to assault the plaintiff in this case or any other seaman.

We find ourselves in complete agreement with the appellant that the Keen case, in undertaking to set up a standard of seaworthiness to which the dispositions of all seamen must equally conform, is a departure from the long settled law governing responsibility for injuries intentionally inflicted by one seaman upon another, as settled in The Rolph, 299 Fed. 52, and in the other cases relied on by appellant. Indeed, the opinion in the Keen case admits that this is so.

[fol. 508] It justifies the departure by creating a standard of admeasurement for seamen which, until our brothers confected it, was, we think never before heard of in fact

---

in good standing with the Coast Guard since he entered the marine service in 1946. He has been, and is, in good standing with the National Maritime Union. (Tr. 233) He has been going to sea since the incident, a part of that time on ships of the defendant. While it is true that the plaintiff did testify that Gonzales had a bad reputation for fighting, there is no testimony that the officers ever knew or heard of this reputation, and the uncontradicted testimony of the master (Tr. 324) is that he fired Gonzales because "I don't want anyone about my ship that fights over the first time. One fight and you are gone, that goes for anyone, not only that man but anybody that does it is finished." Further, while the plaintiff testified that Gonzales was in trouble with the Coast Guard, the record shows that this was not on account of fighting or ill temper but on account of being absent from duty.

This standard our brothers have confected it and laid it down is: "Applied to a seaman such a warranty (of seaworthiness) is not that the seaman is competent to meet all contingencies but that he is equal in disposition and seamanship to the ordinary man in the calling."

or in fiction on sea or on land, nor thereafter adhered
Indeed, the standard is so lacking in definiteness and
jectivity as not only to lead astray hapless district judi
who endeavor to apply it,[5] but to put its creators themselv
hard to it to square their varying verdicts that Keen,
Fed. (2) *supra*, was not, and Jones[6] was, "equal" in
position, as the standard purports to require.]

All of us are more or less different in disposition, ev
those of us who live in old and settled communities in wh
the inhabitants tend to conformity and a settled norm, a
are engaged in occupations conducive to such tendenci
We take judicial notice of the fact, which all men kn
that seamen, drawn as they have been from the four qu
ters of the earth and the seven seas, differ from each oth
even more than men in other callings do, in finger prints a
in disposition. They are not cut out of, they do not t
to conform to, a single or uniform pattern of disposition
behavior. Our brothers, in their opinion in the Jones ca
admit this to be so when they say:

> "Sailors lead a rough life and are more apt to
> their fists than office employees; what will seem
> [fol. 509] sedentary and protected persons an insu
> cient provocation for a personal encounter, is not
> measure of the 'disposition' of 'the ordinary man
> the calling.'" (204 F(2) at 817)

[It is, therefore, quite clear that the proposed standa
presents no reliable or workable measure for determin
whether the mere presence on board of a particular seam
is a breach of the assumed warranty. If any meaning
a definite measure can be adduced for it, this is not becau
in itself the standard conveys the meaning but because
use by its sponsors in the two cases mentioning it and
different results of its application by them point the w
Thus we learn that a seaman who uses a meat cleaver

[5] Jones v. Lykes Bros., 108 Fed. Supp. 323; Bouchoir
Lykes Bros., 112 Fed. Supp. 177.

[6] Lykes Bros. v. Jones, 204 Fed. (2) 815, reversing Jo
v. Lykes Bros., supra.

a fight with another seaman is *not equal* in disposition to an ordinary seaman, while one who strikes another down and thereafter brutally beats, pounds, and otherwise commits mayhem on him while he is helpless and at the mercy of his assailant is. Observation and experience combine to teach, we think, that such reasoning is not standard but personal to the reasoner. We, therefore, decline to accept the so-called standard laid down in the Keen case or to approve the action of the court below in attempting to apply it here.]

We might say in passing, though, that since the assailant in this case did not use a meat cleaver but a bottle, and since he did not, as the assailant did in *Jones v. Lykes*, *supra*, commit mayhem on the plaintiff while he was down and out, we do not believe that the district judge would have thought this was a case for the application in favor of the victim of the equal disposition standard if he had known [fol. 510] that its creators would refuse to apply it in favor of the victim in the Jones case.

We find ourselves in agreement, too, with appellant that upon the question of negligence, the decision below was wrong. [Search the record as one will, there is no substantial evidence upon which to rest a finding that any of the officers knew, or should have known, that anyone on board the ship was liable to be injured as a result of the drinking going on in the boatswain's room. Particularly there was none to support a finding that any of them knew, or should have anticipated, that Gonzales would attack and injure a fellow crewman. There is no evidence that anything was done at, or in connection with, the party which should have warned the watch officer, or caused him to apprehend, that mischief of the kind testified to here was, or was likely to be, afoot.] Even the plaintiff who stopped by and looked in the room about 1:30 A. M., testified that one had to pass in its immediate vicinity to hear the men talking.

[What has occurred here is that clear and certain hindsight has intruded into and usurped the place of reasonable foresight, and a finding has been made and a judgment entered against respondent on the basis of it. This appears particularly clear when the precise nature of the occurrence is examined. This was not an ordinary drunken fight, the

end or consummation of a wordy brawl. It was the res
of the intirely unforeseen and unforeseeable acts of Go
zales (1) in slipping into plaintiff's room for the purpose
purloining from him a bottle of brandy and (2), when ch
lenged and seized by the plaintiff, in seeking, by striki
[fol. 511] plaintiff with the bottle, to make good his esca
and cover his actions.]

The finding of negligence is, in our opinion, clea
erroneous and may not stand. The judgment appea
from is reversed and here rendered for appellant.

[fol. 512] In United States Court of Appeals

No. 14765

Lykes Bros. Steamship Co., Inc.

versus

Elie J. Boudoin
(And Reverse Title)

Judgment—March 26, 1954

This cause came on to be heard on the transcript of t
record from the United States District Court for the Ea
ern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered a
adjudged by this Court that the judgment of the said D
trict Court appealed from in this cause be, and the same
hereby, reversed; and that judgment is here rendered
favor of appellant, Lykes Bros. Steamship Co., Inc., a
against appellee, Elie J. Boudoin;

It is further ordered and adjudged that the appell
Elie J. Boudoin, be condemned to pay the costs of this ca
in this Court, for which execution may be issued out of t
said District Court.

[fols. 513-514] Petition for rehearing covering 2 pa
filed April 15, 1954.

Omitted from this print, it was denied, and nothing no
by order, May 10, 1954.

[fol. 515] In United States Court of Appeals

[Title omitted]

Order Denying Rehearing—May 10th, 1954

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 516] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 517] Supreme Court of the United States, October Term, 1954

No. 95 Misc.

[Title omitted]

On petition for writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Order Allowing Certiorari—October 14, 1954

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, and the case is transferred to the appellate docket and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
JAN 11 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 406

ELIE J. BOUDOIN,
Petitioner-Appellee Below-Appellant

versus

LYKES BROS. STEAMSHIP CO., INC.
Respondent-Appellant Below-Appellee

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S BRIEF ON THE MERITS

RAYMOND H. KIERR
1746 National Bank of
Commerce Building
New Orleans 12, Louisiana
Attorney for Appellant

SAMUEL C. GAINSBURGH
Of Counsel

TABLE OF CONTENTS

Page

Index of Authorities iii
Opinions in The Courts Below 1
Jurisdiction 2
Constitutional Provisions and Statutes Involved 2
Questions Presented For Review 4
Introduction 6
Statement of Facts 8
Summary of Argument 11
Argument:
Point I: The Vessel's Unseaworthiness 13-24

(a) The Nature and Extent of the Warranty of Seaworthiness 14

(b) Is the Keen Case Unprecedented? 15

(c) Is the Keen Test Workable? 17

(d) Have Keen's Authors Repudiated It? 18

(e) What are the Merits of Keen? 19

(f) Under the Keen Test the Instant Vessel was Unseaworthy 21

Point II: Respondent's Negligence Under the Jones Act 24-41

(a) Foreseeability 26

(b) Safe Place to Work 32

(c) Liability for Assault by Subordinate Employees 37

Conclusion 42

STATUTES

	Page
United States Code, Annotated:	
Title 18, Section 2196	27
Title 28, Section 1254 (1)	2
Title 28, Section 2101 (c)	2
Title 28, Rule 52, Federal Rules of Civil Procedure	22, 27
Title 45, Sections 51, et sequitur, "Federal Employers' Liability Act"	3, 4, 30, 36, 37, 40, 41
Title 46, Sections 688, et sequitur, "Jones Act"	2, 3, 24, 25, 38, 41, 42

CONSTITUTIONAL PROVISIONS

Article 3, Section 2, Clause 1	2

COMMENTARIES

Harvard Law Review, Vol. 68 (1954), p. 379 et sequitur	18
Norris, The Law of Seamen, Vol. 2, pp. 493, 231-232	27, 29
Tulane Law Review, Vol. 29 (1954), p. 141 et sequitur	18
Virginia Law Review, Vol. 40 (1954) p. 599 et sequitur	41

ENCYCLOPEDIAS

American Jurisprudence, Vol. 35, Master & Servant, Section 154	30

INDEX OF AUTHORITIES

Page

Cases:

Aguilar v. Std. Oil Co. of N. J., 318, 724, 63 S. Ct. 930, 87 L. Ed. 1107 (1943) 39
Alpha S. S. Corp. v. Cain, 281 U. S. 642, 50 S. Ct. 443, L. Ed. 1086 (1930) 6, 7, 16, 37, 38
Astral, The, 134 F. 1017 (D. Ct. E. D. Penna. 1905) 7, 8, 25
Birks v. United Fruit Co., Inc., 48 F. 2d, 655, 656 (D. Ct. S.D.N.Y. 1930) 6, 15
Blakeley v. Pan-Atlantic S. S. Corp., 1942 A.M.C. 622 (D. Ct. S.D.N.Y. 1942) 6, 8
Bonsalem v. Byron S. S. Co., Ltd., 50 F. 2d 114 (C. C. A. 2d, 1931) 8, 15, 37
Boudoin v. Lykes Bros. Steamship Co., Inc., 112 F. Supp. 177-180 (D. Ct., E. D. La., 1954) 1, 13
Brailas v. Shepard S. S. Co., 152 F. 2d 849 (C.C.A. 2d, 1945) 6, 7, 8, 37
Brock v. Std. Oil Co., of N. J., 33 F. Supp. 353 (D. Ct. E. D. Penna. 1940) 6. 8
Cain v. Alpha S. S. Corp., et al., 35 F. 2d 717, 722 (C. C. A. 2d, 1929) 16
Calmar S. S. Co. v. Taylor, 303 U. S. 525, 58 S. Ct. 651, 82 L. Ed. 993 39
Campbell v. Waterman S. S Corp., 110 F. Supp. 146 (E. D. Penna. 1952) 6, 7, 8
Carlisle Packing Co. v. Sandanger, 259 U. S. 255, 42 S. Ct. 475, 66 L. Ed. 927 (1922) 14
Carpenter v. Matson Navigation Co. (The Hamakua), 1940 A.M.C. 532 (D. Ct. S.D.N.Y. 1940) 6, 8, 25
Carter v. Atlanta & St. A.B.R. Co., 338 U. S. 430, 70 S. Ct. 226, 94 L. Ed. 236 31

Page

Colon v. U. S., 74 F. Supp. 216 (D. Ct. S.D.N.Y. 1947) 6, 7
Condon v. Grace Line, et al., 97 F. Supp. 197 (N. D. Calif., S. Div. 1951) 6, 8
David Evans, The, 187 F. 775 (C.C.A. 9th, 1911) 8
Davis v. Green, 260 U. S. 349, 43 S. Ct. 123, 67 L. Ed. 299 (1922) 40, 41
Department of Banking, State of Nebraska v. Pink, 317, U. S. 264, 63 S. Ct. 233, 87 L. Ed. 254, rehearing denied, 318 U. S. 802, 63 S. Ct. 850, 87 L. Ed. 1166 (1942) 2
Escandon v. Pan-American Foreign Corp., et al., 88 F. 2d 276, (C.C.A. 5th, 1937) 37
Eva B. Hall, The, 114 F. 755 (D. Ct. S.D.N.Y. 1902) 7
Farrell v. U. S., 336 U. S. 511, 69 S. Ct. 707, 93 L. Ed. 658, (1949) 39
Fein v. U. S. A. & A. H. Weinnich (The Wawalona) 1925 A.M.C. 552 (D. Ct. of Oregon) 6, 8
Ford v. United Fruit Co., et al., 171 F. 2d 641 (C.C.A. 9th, 1948) 39
Fred E. Sander, The, 95 F. 829, (D. Ct. Wash. 1899) 7, 8
Gabrielson v. Waydell, et al., 67 F. 342 (C.C.E.D.N.Y., 1895) 6, 8, 25, 30
Garrett v. Moore-McCormack Co., 317 U. S. 239, 63 S. Ct. 246, 87 L. Ed. 239 (1942) 20
Giles Loring, The, 48 F. 463 (D. Maine, 1890) 15
Hern v. Moran Towing & Transportation Co., Inc., 138 F. 2d 900 (C.C.A. 2d, 1943) 32
Holland v. Seven Hundred Twenty-Five Tons of Coal, 36 F. 784, (E. D. Wis., 1888) 14, 20
Hong v. U. S., 59 F. Supp. 794 (D. Ct. S.D.N.Y. 1944) 6, 8, 25

Page

Hylton v. So. Ry. Co., 87 F. 2d 393 (C.C.A. 6th, 1937) ... 31
Jamison v. Encarnacion, 281 U. S. 635, 50 S. Ct. 440, 74 L. Ed. 1082 (1930) ... 6, 7, 30, 37, 38, 40
Jensen v. U. S. 'The Anaconda) 1934 A.M.C. 709, (D. Ct. S.D.N.Y. 1934) ... 6, 8
Jensen v. United States, 184 F. 2d 72 (C.C.A. 3rd, 1950) ... 6, 8, 25, 29
John & Winthrop, The, 182 F. 380 (C.C.A. 9th, 1910) ... 8
Jones v. Lykes Bros. S. S. Co., Inc., 204 F. 2d 815 (C.C.A. 2d, 1954) ... 6, 8, 17, 18, 19, 23, 24
Kable v. United States, 169 F. 2d 90 (C.C.A. 2d, 1948) ... 6, 7, 15, 37
Keen v. Overseas Tankship Corp., 194 F. 2d 515 (C.C.A. 2d, 1952) ... 6, 8, 13, 14, 15, 16, 17, 18, 19, 20, 23
Kelcey v. Tankers Co., Inc., 217 F. 2d (C.C.A. 2d, (1954) ... 6, 8, 18, 23
Kentigirn, The, 99 F. 443, (D. Ct. E.D.N.Y. 1900) ... 7
Koehler v. Presque-Isle Transp. Co., 141 F. 2d 490 (C.C.A. 2d, 1944) ... 6, 8, 15, 25, 32
Kyriakos v. Goulandris, 151 F. 2d 132 (C.C.A. 2d, 1945) ... 6, 8, 25
Lillie v. Thompson, 332 U. S. 459, 68 S. Ct. 140, 92 L. Ed. 73 (1947) ... 32
Lizzie Burrill, The, 115 F. 1015 (D. Ct. S. D. Ala. 1902) ... 7, 8, 25, 30
Ludlow, The, 280 F. 162 (D. Ct. N. D. Fla. 1922) ... 6, 7
Lykes Bros. Steamship Co., Inc. v. Boudoin, 211 F. 2d 618-622 (C.C.A., 5th, 1954) ... 1
Lykes Bros. S. S. Co., Inc. v. Grubaugh, 128 F. 2d 387 (C.C.A. 5th, 1942) ... 6, 7, 37
McAllister v. U. S., 75 S. Ct. 6 (November 8, 1954) ... 18, 27

Page

Manich v. So. S. S. Co., 321 U. S., 96, 64 S. Ct. 455, 88 L. Ed. 561 (1944) 14, 17
Mariner, The, 1939 A.M.C. 295 (D. Ct. S. D. Calif. 1939) 6, 7
Marion Chilcott, The, 95 F. 688 (D. Ct. D. Wash., N. Div. 1899) 7, 8, 25, 30
Maryland Casualty Co. v. Cushing, 347 U. S. 409, 74 S. Ct. 608, 1954 A.M.C. 837, 845 (1954) 17
Montiero v. Paco Tankers, Inc., et al., 93 F. Supp. 93 (E. D. Penna. 1950) 6, 8, 25
Nelson v. American West African Lines, Inc., 86 F. 2d 730 (C.C.A. 2d, 1936) 6, 7, 37
Nowery v. Smith, 69 F. Supp. 755 (E. D. Penna. 1946) 6, 7, 8, 15, 25
Osceola, The, 189 U. S. 158, 23 S. Ct. 483, 47 L. Ed. 760 (1903) 14, 24
Pacific Mail S. S. Co., In Re, 130 F. 76 (C.C.A. 9th, 1904) 15
Pease v. Sinclair Ref. Co., 104 F. 2d 183 (C.C.A. 2d, 1939) 32
Pittsburgh S. S. Co. v. Scott, 159 F. 2d 373 (C.C.A. 6th, 1947) 6, 7, 37
Rey v. Colonial Navig. Co., 116 F. 2d 580 (C.C.A. 2d 1941) 32
Robinson, The, 3 F. 2d 507 (D. Ct. E. D. Penna, 1925) 6, 8
Rolph, The, Rolph Navigation & Coal Co. v. Kohilas (Kaptein, et al., Intervernors), 299 F. 52 (C.C.A. 9th, 1924) 6, 8, 15, 16, 25
Sallie Ion, The, 153 F. 659 (D. Ct. E. D. Penna. 1907) 7
Seas Shipping Co. v. Sieracki, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946) 14, 20

Page

Sinaloa, The, 292 F. 640 (D. Ct. N.D. Calif. 1923) 6, 8
Spellman v. Am. Barge Line Co., 176 F. 2d 716 (C.C.A. 3d, 1949) 15, 20
Stankiewicz v. United Fruit S. S. Corp., et al., 123 F. Supp. 714 (D. Ct. S. D. N. Y., 1954) 6, 8, 18, 25, 29
Steely v. Kurn, 313 U. S. 545 (1941) 37, 38, 40
Straton v. U. S., et al. 8 F. Supp. 429 (D. Ct. S.D.N.Y. 1943) 6
Sullivan v. U. S., 32 F. Supp. 947 (D. Ct. S. D. N. Y. 1940) 6, 8
Sundberg v. Washington Fish & Oyster Co., 138 F. 2d 801, (C.C.A. 9th, 1943) 39, 40
Sutherland v. Ore Steamship Corp. 1929 A.M.C. 1454 (D. Ct. S. D. N. Y. 1929) 6, 7
Thompson v. Coastal Oil Co., 119 F. Supp. 838, (D. Ct. D. N. J., 1954) 6, 8, 18
The Thrasher, 173 F. 258 (C.C.A. 9th, 1909) 8
Vueltabajo, 163 F. 594, (D. Ct. S. D. Ala. 1908) 7
West v. Calmar Steamship Corp. (The Cubore) 1932 A.M.C. 435, (D. Ct. S. D. N. Y. 1932) 6, 7
The Whisper, Wolfe v. Thomas, 268 F. 464, (C.C.A. 6th, 1920) 6, 7
Wilcox v. U.S; 32 F. Supp. 947 (D. Ct. S. D. N. Y. 1940) 6, 8
Yukes v. Globe S. S. Corp., 107 F. 2d 888 (C.C.A. 6th, 1939) 6, 7, 37

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1954

NO. 406

ELIE J. BOUDOIN,
Petitioner-Appellee Below

versus

LYKES BROS. STEAMSHIP CO., INC.
Respondent-Appellant Below

PETITIONER'S BRIEF ON THE MERITS

MAY IT PLEASE THE COURT:

The opinions delivered in the Courts below are reported as follows:

Lykes Bros. Steamship Co., Inc. v. Boudoin, and reverse title, 211 F. 2d 618-622 (C.C.A., 5th, 1954); and *Boudoin v. Lykes Bros. Steamship Co., Inc.*, 112 F. Supp. 177-180 (D. Ct., E. D. La., 1953).

JURISDICTION

This cause is presently before the Court on a writ of certiorari to the Court of Appeals for the Fifth Circuit granted October 14, 1954 under the Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U.S.C.A. 1254 (1). The petition for the writ was timely filed, within ninety (90) days from May 10, 1954, the date on which petitioner's application for rehearing was denied by the Court of Appeals for the Fifth Circuit.[1]

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The constitutional provision applicable to the instant matter is Article 3, Sec. 2, Clause 1:

> "The judicial Power shall extend to all Cases . . . of admiralty and maritime jurisdiction; . . . "

The statutes involved are the *Jones Act*,[2] reading in part as follows:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all

---

[1]Act of June 25, 1948, C. 646, 62 Stat. 961, as amended May 24, 1949, C. 139, § 106, 63 Stat. 104, 28 U.S.C.A. 2101 (c); Department of Banking, State of Nebraska v. Pink, 317 U. S. 264, 63 S. Ct. 233, 87 L. Ed. 254, rehearing denied, 318 U. S. 802, 63 S. Ct. 850, 87 L. Ed. 1166 (1942); R. 509.

[2]Act of June 5, 1920, C. 250, 41 Stat. 1007, 46 U.S.C.A. § 688 et seq.

> statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply * * * ."[3]

and the *Federal Employers Liability Act*,[4] reading in part as follows:

> "Every common carrier by railway while engaging in commerce between any of the several States * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in the case of death of such employee * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its * * * equipment * * *."[5]

> "That in any action brought * * * by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employees shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of its officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risk of

---

[3]46 U.S.C.A., § 688.
[4]Act of April 22, 1908, C. 149, 35 Stat. 65, 45 U.S.C.A. § 51 et seq., hereinafter referred to as F.E.L.A.
[5]45 U.S.C.A., § 51.

his employment in any case where the violation * * * of any statute enacted for the safety of employees contributed to the injury or death of such employee."[6]

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review on this appeal are:

1. Is a shipowner liable in damages for permitting a crewmember to become excessively intoxicated and so irrational that he commits an assault without provocation using a dangerous weapon?

2. Is a negligent or irresponsible act on the part of an inebriated seaman a reasonably foreseeable consequence of his intoxication?

3. Does the absolute warranty of seaworthiness of the entire *vessel* encompass the vessel's *crew*?

4. If the vessel unconditionally guarantees the seaworthiness of a crewmember, should a shipowner be excused from liability if it does not *know* of the seaman's deficiency?

5. Is a seaman unseaworthy who is *not* equal in disposition and temperament to the ordinary man in the calling?

6. Is a seaman competent, fit, seaworthy, and an ordinary man in the calling, if he does the following:

---

[6] 45 U.S.C.A., § 54.

(a) drinks aboard ship in violation of the articles of agreement and company rules;

(b) becomes a vicious criminal aboard ship because of excessive drinking;

(c) enters another's sleeping quarters in the dead of night to commit a crime;

(d) pilfers on the ship;

(e) assaults with dangerous weapons;

(f) unprovokedly batters a shipmate with a glass bottle;

(g) threatens the vessel's officers with bodily harm;

(h) disobeys the lawful commands of the master;

(i) succumbs to an addiction to overindulgence in drink;

(j) vents a brutal disposition;

(k) absents himself from the vessel against explicit orders of the captain; and

(l) conducts himself aboard ship in such manner as to require restraint with irons.

7. Should an appellate tribunal set aside a trial court's findings of fact which are not clearly erroneous?

INTRODUCTION

During the past six decades cases considered by the federal courts involving assaults upon seamen aboard ships are not uncommon.[7]

---

[7]Alpha S. S. Corp. v. Cain, 281 U. S. 642, 50 S. Ct. 443, 74 L. Ed. 1086 (1930); Jamison v. Encarnacion, 281 U. S. 635, 50 S. Ct. 440, 74 L. E. 1032 (1930); Kelcey v. Tankers Co., Inc., 217 F. 2d (C. C. A. 2d, 1954); Jones v. Lykes Bros. S. S. Co., Inc., 204 F. 2d 815 (C.C.A. 2d, 1953); Keen v. Overseas Tankship Corp., 194 F. 2d 515 (C.C.A. 2d, 1952); Jensen v. United States, 184 F. 2d 72 (C.C.A. 3rd, 1950); Kable v. United States, 169 F. 2d 90 (C.C.A. 2d, 1948); Pittsburgh S. S. Co. v. Scott, 159 F. 2d 373 (C.C.A. 6th, 1947); Brailas v. Shepard S. S. Co., 152 F. 2d 849 (C.C.A. 2d, 1945); Kyriakos v. Goulandris, 151 F. 2d 132 (C.C.A. 2d, 1945); Koehler v. Presque-Isle Transp. Co., 141 F. 2d 490 (C.C.A. 2d, 1944); Lykes Bros. S. S. Co., Inc. v. Grubaugh, 128 F. 2d 387 (C.C.A. 5th, 1942); Yukes v. Globe S. S. Corp., 107 F. 2d 888 (C.C.A. 6th, 1939); Nelson v. American-West African Lines, Inc., 86 F. 2d 730 (C.C.A. 2d, 1936); The Rolph, Rolph Navigation & Coal Co. v. Kohilas (Kaptein, et al., Intervenors), 299 F. 52 (C.C.A. 9th, 1924); The Whisper, Wolfe v. Thomas, 268 F. 464, (C.C.A. 6th, 1920); Gabrielson v. Waydell, et al., 67 F. 342 (C.C.E.D.N.Y., 1895); Stankiewicz v. United Fruit S. S. Corp., et al., 123 F. Supp. 714 (D. Ct. S.D.N.Y., 1954); Thompson v. Coastal Oil Co., 119 F. Supp. 838, (D. Ct. D.N.J., 1954); Campbell v. Waterman S. S. Corp., 110 F. Supp. 146 (E. D. Penna. 1952); Condon v. Grace Line, et al., 97 F. Supp. 197 (N. D. Calif., S. Div. 1951); Montiero v. Paco Tankers, Inc., et al., 93 F. Supp. 93 (E. D. Penna. 1950); Colon v. U. S., 74 F. Supp. 216 (D. Ct. S.D.N.Y. 1947); Nowery v. Smith, 69 F. Supp. 755 (E. D. Penna. 1946); Hong v. U. S., 59 F. Supp. 794 (D. Ct. S.D.N.Y. 1944); Blakeley v. Pan-Atlantic S. S. Corp., 1942 A.M.C. 662 (D. Ct. S.D.N.Y. 1942); Brock v. Std. Oil Co. of N. J., 33 F. Supp. 353 (D. Ct. E. D. Penna. 1940); Carpenter v. Matson Navigation Co. (The Hamakua), 1940 A.M.C. 532 (D. Ct. S.D.N.Y. 1940); Wilcox v. U. S.; Sullivan v. U. S., 32 F. Supp. 947 (D. Ct. S.D.N.Y. 1940); The Mariner, 1939 A.M.C. 295 (D. Ct. S. D. Calif. 1939); Stratton v. U. S., et al. 8 F. Supp. 429 (D. Ct. S.D.N.Y. 1934); Jensen v. U. S. (The Anaconda), 1934 A.M.C. 709, (D. Ct. S.D.N.Y. 1934); West v. Calmar Steamship Corp. (The Cubore) 1932 A.M.C. 435, (D. Ct. S.D.N.Y. 1932); Birks v. United Fruit Co., Inc., 48 F. 2d 655, 656, (D. Ct. S.D.N.Y. 1930); Sutherland v. Ore Steamship Corp., 1929 A.M.C. 1454 (D. Ct. S.D.N.Y. 1929); Fein v. U.S.A. & A. H. Weinnich (The Wawalona) 1925 A.M.C. 552 (D. Ct. of Oregon); The Robinson, 3 F. 2d 507 (D. Ct. E. D. Penna. 1925); The Sinaloa, 292 F. 640 (D. Ct. N. D. Calif. 1923); The Ludlow, 280 F. 162 (D. Ct. N. D. Fla. 1922); The

(Continued)

We find these causes grouping themselves under one or more of the following theories of liability:

1. *Respondent superior:* where the assault was committed by the victim's superior while the latter was asserting the authority conferred upon him by the shipowner;[8]

2. *Direct negligence:* where the assault resulted from the failure of those in authority, representing the employer,

(a) to maintain proper order, discipline and good treatment aboard ship, or

(b) to discharge or restrain a **known** vicious

---

[7] Continued —
Vueltabajo, 163 F. 594, (D. Ct. S. D. Ala. 1908); The Sallie Ion, 153 F. 659 (D. Ct. E. D. Penna. 1907); The Astral, 134 F. 1017 (D. Ct. E. D. Penna. 1905); The Lizzie Burrill, 115 F. 1015 (D. Ct. S. D. Ala. 1902); The Eva B. Hall, 114 F. 755 (D. Ct. S.D.N.Y. 1902); The Kentigirn, 99 F. 443, (D. Ct. E.D.N.Y. 1900); The Marion Chilcott, 95 F. 688 (D. Ct. D. Wash., N. Div. 1899); The Fred E. Sander, 95 F. 829, (D. Ct. D. Wash. 1899).

[8] Alpha S. S. Corp. v. Cain; Jamison v. Encarnacion; Kable v. U. S.; Pittsburgh S. S. Co. v. Scott; Nowery v. Smith; Brailas v. Shepard S. S. Co.; Lykes Bros. S. S. Co., Inc. v. Grubaugh; Yukes v. Globe S. S. Corp.; Nelson v. American-West African Line, Inc.; Campbell v. Watermann S. S. Corp.; Colon v. U. S.; The Mariner; West v. Calmar S. S. Corp.; Sutherland v. Ore S. S. Corp.; Wolfe v. Thomas (The Whisper); The Ludlow; all *supra*, note 7.

crewmember or officer so as to prevent the abuse to the injured seaman;[9] and

3. *Unseaworthiness:* where the assailant was of such sub-standard disposition and temperament as to be unequal to the ordinary man of the calling and therefore defective, rendering the vessel unseaworthy.[10]

In the instant case both the assailant and the victim were subordinate employees. Therefore, the case at bar does *not* present a typical *respondeat superior* situation.

STATEMENT OF FACTS

Boudoin, a merchant seaman, sued his employer to recover damages for personal injuries sustained during November of 1949 aboard the Steamship MASON LYKES

---

[9]Jensen v. U. S.; Nowery v. Smith; Brailas v. Shepard S. S. Co.; Kyriakos v. Goulandris; Koehler v. Presque-Isle Transp. Co.; all *supra*, note 7. The David Evans, 187 F. 775 (C.C.A. 9th, 1911); The John & Winthrop, 182 F. 380 (C.C.A. 9th, 1910); The Thrasher, 173 F. 258 (C.C.A. 9th, 1909); Gabrielson v. Waydell, et al.; Stankiewicz v. United Fruit S. S. Corp., et al.; Campbell v. Waterman S. S. Corp.; Condon v. Grace Line, et al.; Montiero v. Paco Tankers, Inc., et al.; Hong v. U. S.; Blakeley v. Pan-Atlantic S. S. Corp.; Brock v. Standard Oil Company of N. J.; Carpenter v. Matson Navigation Co. (The Hamakua); Wilcox v. U. S.; Sullivan v. U. S.; Jensen v. U. S. (The Anaconda); The Robinson; The Sinaloa; The Astral; The Lizzie Burrill; The Marion Chilcott; The Fred E. Sander; all *supra*, note 7.

[10]Kelcey v. Tankers Co., Inc.; Jones v. Lykes Bros. S. S. Co., Inc.; Keen v. Overseas Tankship Corp.; Rolph Navigation Co. v. Kohilas (The Rolph); *supra* note 7; and see Bonsalem v. Byron S. S. Co., Ltd., 50 F. 2d 114 (C.C.A. 2d, 1931); Stankiewicz v. United Fruit S. S. Corp., et al.; Thompson v. Coastal Oil Co.; The Sinaloa; Fein v. U. S. and A. H. Weinnich; all *supra* note 7.

then anchored at Walvis Bay, Africa.[11] He was assaulted by another member of the vessel's crew, Gonzales, who struck him on the head with an unopened bottle of souvenir brandy[12] which Gonzales was attempting to steal from Boudoin's forecastle.[13]

In the early evening of November 24, 1949, Gonzales and several other men from this vessel went ashore and drank until the shoreside establishments closed,[14] whereupon they bought three more bottles (fifths or quarts) of whiskey.[15] They returned to the vessel and continued their all-night drinking in the quarters of the boatswain until the early hours of the following morning,[16] notwithstanding that the shipping articles[17] as well as the company's safety rules[18] prohibited consumption of any intoxicants aboard ship.

During the course of the shipboard drinking bout Gonzales drank almost a full bottle more of whiskey[19] and became highly intoxicated.[20]

The noise from the drinking party was audible in the messhall[21] and in the passageway running through the quarters.[22]

---

[11]R. 2.
[12]R. 91.
[13]R. 84.
[14]R. 428-429.
[15]R. 430.
[16]R. 430-432.
[17]R. 228, 243-244; Deft.-Pl. Ex. 18.
[18]R. 136, 147-149, 326.
[19]R. 436.
[20]R. 434-435, 475.
[21]R. 78-79.
[22]R. 82-83.

All of the time during which the drinking was going on in the crew's quarters one of the vessel's officers was keeping the watch aboard ship.[23] The duties of the watch officer required him to stay awake and to maintain peace aboard the vessel[24] by making rounds and policing the ship,[25] and by taking effective disciplinary action to suppress any drinking.[26] On the occasion of the drinking party Third Officer Brock made frequent inspections of the crew's quarters.[27]

Gonzales entered Boudoin's room in the crew's quarters, at which time Boudoin, who had not participated in the shipboard drinking party,[28] was asleep or almost asleep in his bed.[29] When discovered, Gonzales struck Boudoin with the glass bottle and threatened to kill him,[30] which threat he later reiterated.[31] Leaving Boudoin's living quarters Gonzales armed himself with a butcher knife.[32] Thereafter, Gonzales, who had a general reputation for belligerence,[33] threatened Third Officer Brock.[34]

Gonzales persisted in his course of unlawful conduct, flaunting the express commands of the captain, absenting himself from the ship, drinking and bringing whiskey

---

[23]R. 81.
[24]R. 326.
[25]R. 81-82.
[26]R. 149.
[27]R. 105, 131-132; Pl. Ex. 5.
[28]R. 79.
[29]R. 83, 112.
[30]R. 93, 112-113.
[31]R. 322.
[32]R. 114, 315-316, 319; see also R. 242; Pl. Ex. "U. S. Coast Guard." (Official Log Book and Appendages)
[33]R. 86, 88-90, 114-115, 117-118.
[34]R. 291; see also R. 242; Pl. Ex. "U. S. Coast Guard" (Official Log Book and Appendages)

aboard, until eventually he was restrained by being placed in irons.[35]

Gonzales was fired from this vessel at the termination of the voyage.[36] He was subsequently reemployed by the respondent shipping company on several of its vessels;[37] it developed after the trial that Gonzales was in this company's employ at the time of trial.[38]

SUMMARY OF ARGUMENT

I. *The Vessel's Unseaworthiness*

It is Boudoin's position that his injuries were occasioned by the *unseaworthiness* of the Steamship *Mason Lykes* due to the presence in her crew of another seaman, Gonzales, who unprovokedly assaulted him with a glass bottle.

The trial court found that during the voyage in question the assailant was not equal in disposition and temperament to the ordinary man who follows the sea; and the vessel was thereby rendered unseaworthy, notwithstanding that the shipowner may have been unaware of Gonzales' deficiencies.

On appeal, the *ordinary-temperament-and-disposition* test was disapproved, and it was held that there can be no liability unless the shipowner knew of the assailant's vicious propensities and failed, through its officers, to discharge or restrain the deficient crewmember.

---

[35] R. 298.
[36] R. 274, 324.
[37] R. 146, 154, 216.
[38] R. 419.

The view followed by the trial court in determining liability is based upon sound analogy and legal principles and accords with the policy of the maritime law toward seamen; it should be approved by this Honorable Court.

II. *Respondent's Liability for Negligence Under the Jones Act*

The officers of the Steamship *Mason Lykes* knowingly permitted at least three members of the unlicensed crew, including the assailant, Gonzales, to imbibe intoxicants for several hours *aboard ship,* as a result of which Gonzales, who had a general reputation for belligerence especially when drunk, unprovokedly assaulted and battered Boudoin with a glass bottle. There is a rule against drinking aboard ships.

Under the applicable statutes, as interpreted and applied by this Honorable Court, respondent was negligent because:

(1) Boudoin's injury was the legally foreseeable consequence of the ship-officers' failure to prevent shipboard drinking and intoxication;

(2) Failure of the officers to maintain proper order and discipline constitutes a breach of respondent's duty to furnish Boudoin with a safe vessel upon which to live and work; and

(3) An employer should be liable for an unprovoked, wilful assault by one employee upon another of equal station where the victim is sleep-

> ing in his quarters in the course of his employment.

The trial court's conclusion of negligence should be reinstated.

ARGUMENT

POINT I.

THE VESSEL'S UNSEAWORTHINESS

As observed in the application for the writ, Boudoin's claim of "unseaworthiness" brings before this Court a matter of first impression.

The District Court concluded that the presence of Gonzales, the assailant, on board the Steamship "Mason Lykes" constituted a breach of respondent's duty to furnish Boudoin with a seaworthy vessel.[39] The legal test of seaworthiness which the trial Judge applied herein is the standard enunciated by the Court of Appeals for the Second Circuit, through Learned Hand, Circuit Judge, in the case of *Keen v. Overseas Tankship Corporation*[40] to wit:

> A vessel is unseaworthy when it has among its complement of personnel a crewmember who is unequal in disposition and temperament to the ordinary man in the calling of merchant seamen.

It is this test or standard which the Court of Appeals for

---

[39]Trial Court's conclusions 2, 3, 4 and 5; R. 486; 112 F. Supp. 180.
[40]194 F. 2d 515 (C.C.A. 2d, 1952).

the Fifth Circuit has repudiated.[41] Thus, the present appeal, insofar as the claim of unseaworthiness is concerned, presents the question as to whether the *Keen* case is or is not to be approved.

(a) THE NATURE AND EXTENT OF THE WARRANTY OF SEAWORTHINESS

The broad foundation upon which the *Keen* decision rests is the vessel owner's duty to provide a *seaworthy* vessel for the crew. That this *warranty of seaworthiness* runs in favor of the seaman has not been seriously disputed since the decision in *The Osceola.*[42]

The nature and quality of this warranty to the seaman are firmly established. It is *absolute,* a species of *liability without fault,* independent and irrespective of knowledge, of due diligence and of the customary concepts of negligence.[43] The warranty encompasses not only the vessel, but also her appurtenances,[44] her appliances[45] and her supplies;[46] no less pertinent to the instant case, the warranty extends to the fitness of the crew as regards their sufficiency in number,[47] their ability to carry on the voyage in

---

[41] Opinion of the Court of Appeals, R. 507:
"We, therefore, decline to accept the so called standard laid down in the Keen case or to approve the action of the Court below in attempting to apply it here."

[42] 189 U. S. 158, 23 S. Ct. 483, 47 L. Ed. 760 (1903).

[43] Seas Shipping Co. v. Sieracki, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946).

[44] Id.

[45] Manich v. So. S. S. Co., 321 U. S. 96, 64 S. Ct. 455, 88 L. Ed. 561 (1944).

[46] Carlisle Packing Co. v. Sandanger, 259 U. S. 255, 42 S. Ct. 475, 66 L. Ed. 927 (1922).

[47] Holland v. Seven Hundred Twenty-Five Tons of Coal, 36 F. 784, (E. D. Wis., 1888).

the absence of the Master,[48] their ability to expediently converse with the vessel's officers,[49] and the ability of the master to properly care and provide for a mentally deranged crewmember.[50]

(b) IS THE KEEN CASE UNPRECEDENTED?

The opinion of the Court of Appeals, agreeing with respondent's interpretation of prior jurisprudence, holds that the *Keen* case

> "is a departure from the long settled law governing responsibilities for injuries intentionally inflicted by one seaman upon another, as settled in The Rolph, 299 Fed. 52, and in the other cases relied on by appellant."[51]

Insofar as the said appellate opinion below and also prior decisions,[52] including even the *Keen* decision itself,[53] interpret the decision in *The Rolph* as being based on the *knowledge* of the vicious proclivities of the offending seaman, we submit that these decisions incorrectly conceive the *ratio decidendi* of *The Rolph* case. Analysis of the hold-

---

[48]The Giles Loring, 48 F. 463 (D. Maine, 1890).
[49]In re Pacific Mail Line S. S. Co., 130 F. 76 (C. C. A. 9th, 1904).
[50]Spellman v. Am. Barge Line Co., 176 F. 2d 716 (C. C. A. 3d, 1949).
[51]Opinion of the Court of Appeals, R. 505.
[52]Kable v. U. S.; Koehler v. Presque-Isle Transp. Co.; Nowery v. Smith and Birks v. United Fruit Co., Inc.; all supra note 7; see, however, *dictum* in Bonsalem v. Byron S. S. Co., Ltd., 50 F. 2d 144 (C.C.A. 2d 1931) at p. 115: "A recovery might be allowed on the theory of incompetence of officers which constituted unseaworthiness, and such brutality of treatment of a seaman would constitute incompetence, for the owner is *unqualifiedly* bound to provide a seaworthy vessel. The Rolph, 299 F. 52 (C.C.A. 9)." (Emphasis added).
[53]194 F. 2d 515, 517.

ing in *The Rolph* reveals that the *knowledge* of the captain regarding the mate's vicious disposition was *not essential* to the vessel's liability, as is patent from the following portion of the opinion:

> "It is said that the owner does not select the mate and therefore the ship cannot be held. But it is established that while the master of the ship selects the mate, in doing so he is the representative of the owner in respect to the obligation to equip the ship with a competent officer, to make her seaworthy, and *the duty of the owner in such respect is one not to be . . . avoided by the plea that the master did not KNOW the ship was unseaworthy when the voyage was commenced.*"[54] (Emphasis added)

The *Keen* case is no less sound even if, as respondent insists, it has no antecedent authority. *Stare decisis*, or the lack of it, should not hinder the progress of the law. As expressed by Judge Swan in *Cain v. Alpha S. S. Corp., et al.*[55]

> "The maritime law, no less than the common law, is not incapable of growth by judicial decision. Changes in conditions under which commercial shipping is conducted, as well as changes in economic notions of where loss suffered in the course of a business should fall, should be reflected in the action of the courts, even though it result in filling pages which history left blank."

---

[54]The Rolph, 299 F. 52, 55 (C.C.A. 9th, 1924).
[55]35 F. 2d 717, 722 (C.C.A. 2d, 1929), disapproved on other grounds in Alpha S. S. Corp. v. Cain, supra note 7.

These considerations of Judge Swan in the *Cain* case are not inconsistent with those of Judge Hand in the *Keen* case, which latter appeal they heard together. The *Keen* trial Judge's apprehension, that the application of the seaworthiness doctrine to the facts of that case would destroy the American Merchant Marine, was assuaged when Judge Hand alluded, in language familiar to Your Honors,[56] to the general current practice of insuring maritime risks.[57]

(c) IS THE KEEN TEST WORKABLE?

The appellate opinion in the instant case substantively criticizes the test of the *Keen* decision on the ground that it is lacking in definiteness and objectivity to such an extent as to embarrass even its alleged creators by a subsequent application[58] in *Jones v. Lykes Bros.*[59] It should be observed first of all that the *Jones* case **affirms** the *Keen* test and simply holds that the assailant in the *Jones* case is not "unseaworthy" when put to that test. The *Keen* case involved one set of facts, the *Jones* case another; unseaworthiness, generally, is no more than a question of fact.[60] Secondly, regarding the workability of the test, it is submitted that no more difficulty attends the determination that a particular seaman is *not of equal disposition to the ordinary man of the sea* than is experienced in concluding that some act or omission attributed to any common alleged tort feasor

---

56 Maryland Casualty Co. v. Cushing, 347 U. S. 409, 74 S. Ct. 608, 1954 A.M.C. 837, 845 (1945): "Substantially all maritime risks are insured."

57 Keen v. Overseas Tankship Corp., 194 F. 2d 515, 518.

58 Opinion of the Court of Appeals, R. 506.

59 204 F. 2d 815 (C.C.A. 2d, 1953).

60 Manich v. So. S. S. Co., 321 U. S. 96, 64 S. Ct. 455, 88 L. Ed. 581 (1944).

renders him *not equal to the "average reasonable man."*[61]

It should not be concluded that the doctrine of *Keen* is unworkable merely because in one case a vessel may be seaworthy[62] and in another, under different facts, the vessel is held to be *un*seaworthy.[63] If the facts of two cases are *different*, their results may, and usually do, vary under *any* legal theory.

Nor should the workability of the *Keen* test be questioned merely because a trial Judge who found a vessel unseaworthy was reversed on appeal, as in *Jones v. Lykes.* This Honorable Court has only recently, in *McAllister v. U. S.*,[64] reversed an appellate court on the question of the legal significance of facts in a simple negligence case; but it can hardly be imagined that, because of this action in the *McAllister* case, the average-reasonable-man test no longer merits retention in the law.

(d) HAVE KEEN'S AUTHORS REPUDIATED IT?

It has been erroneously concluded[65] that the *Keen* decision has been repudiated or "watered down" by its authors in their subsequent decision in *Jones v. Lykes.* Obviously these views were conceived and expressed before the determination by the Court of Appeals for the Second Circuit of the case of *Kelcey v. Tankers Co., Inc.*,[66] which cites *both*

---

[61]See 68 Har. L. Rev. 379, 380 (1954).
[62]Stankiewicz v. United Fruit S. S. Corp., et al., supra note 7.
[63]Thompson v. Coastal Oil Co., supra note 7.
[64]McAllister v. U. S., 75 S. Ct. 6 (November 8, 1954).
[65]29 Tul. L. Rev. 141, 144 (1954); Respondent's Brief in Answer to the Petition for the Writ of Certiorari in the instant case, p. 9.
[66]No. 77, Oct. Term, 1954, C. C. 6 2d, Nov. 22, 1954.

Keen and Jones in support of its finding that a vessel was rendered **unseaworthy** by the presence on board of the assailant.

The *Jones* case **strengthens** the *Keen* case by restating the doctrine that the substandard disposition of a crewmember may render a vessel unseaworthy; its holding for defendant is simply the result of an **application** of the *Keen* doctrine. These two cases, *Keen* and *Jones*, based upon the same legal theory, demonstrate a frequent end to litigation: different facts, different results.

The *Keen* doctrine has not been undermined nor diluted.

We submit that the foregoing answers those *Keen* critics who have taken a **negative** approach to the doctrine based upon alleged lack of precedent for it and an unfounded fear as to its workability.

(e) WHAT ARE THE MERITS OF KEEN?

And now, making an **affirmative** evaluation, we find that supporting the *Keen* decision are established principles of maritime law and policy which the court in the *Keen* case has properly applied by analogy to cover the facts of the instant case and future cases of this nature. Among these considerations are:

(1) The *wardship doctrine*, evidencing the benevolence with which the Court has viewed the American seaman

throughout the nation's legal history;[67]

(2) The *warranty of seaworthiness doctrine*, by which the vessel and her owner are held to an absolute and non-delegable duty to guarantee the seaman against the failure of materiel, appliances, gear and hull from latent defects and inadequacies;[68] and,

(3) The *extension of the warranty of seaworthiness* to encompass the *occupational* competence or integrity of the crew.[69]

The *Keen* decision **applies** these principles to the *dispositional* competence or integrity of a crewmember:

> "We can see no reason for saying that, although the owner is liable if the ship's plates are started without his knowledge, he is not liable if he signs on a homicidal paranoiac, whose appearance does not betray his disposition."[70]

As we understand the test applied to the *disposition* of a crewmember it is that he must be "equal in disposition to the ordinary man" who follows the sea. Hull, gear and ap-

---

[67]See Garrett v. Moore-McCormack Co., 317 U. S. 239. 63 S. Ct. 246, 87 L. Ed. 239 (1942).

[68]Seas Shipping Co. v. Sieracki, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946).

[69]Spellman v. Am. Barge Line Co.; In re Pacific Mail S. S. Co.; The Giles Loring; Holland v Seven Hundred and Twenty-Five Tons of Coal; supra, notes 50, 49, 48, and 47, respectively.

[70]Keen v. Overseas Tankship Corp., 194 F. 2d 515, 518 (C. C. A. 2d, 1952).

pliances must be reasonably fit for the voyage in question by well settled principles, else the ship is unseaworthy. If, because of some latent deficiency in a seaman's temperament or personality he cannot withstand the demands of a long foreign ocean voyage imposing upon him all of the risks and hardships, privations and confinements, incident thereto, and as a result he becomes unstable and commits an unprovoked assault upon another crewmember, can it be fairly said that such a man is "reasonably fit for the voyage in question?" The law has wisely determined that the risk of injury to the seaman from unseaworthy defects, even though latent, in hull and gear shall be borne by the ship. There is no logical reason for any deviation where the defect occurs in the persons who handle the hull and gear.[71] Thus, the doctrine of the *Keen* case merits approval.

(f) UNDER THE KEEN TEST THE INSTANT VESSEL WAS UNSEAWORTHY

Applying the *Keen* test, the trial Court in the case at bar, held that the Steamship *Mason Lykes* was unseaworthy during the voyage in question because of the presence aboard of Manuel Gonzales.[72]

This holding is based upon the Judge's finding[73] that:

> "Manuel Gonzales was a person of violent character, belligerent disposition, excessive drinking hab-

---

[71] Ibid.
[72] R. 486; Trial Court's Conclusions of Law, Nos. 2, 3, 4 and 5.
[73] R. 484; Trial Court's Findings, No. 20.

its, disposed to fighting and making threats and assaults."[74]

It is submitted that the Appellate Court below did not disturb the trial Judge's finding of *fact* as to Gonzales' defective disposition and temperament, because of its opinion that there was no liability as a matter of *law*. In any event, the trial Court's finding of fact as to Gonzales' unseaworthy disposition and temperament is not clearly erroneous and, therefore, is unassailable.[75]

It is interesting to note the speculation in which the Court of Appeals for the Fifth Circuit indulges as to what

---

[74]The trial Judge's finding is supported by the following evidentary facts, to wit:

R. 86: "The guy (Gonzales) was a big bully in the first place, hollering about who he beat up ashore."

R. 458: Gonzales has been staggered and has staggered others in fights ashore.

R. 89-90: It was generally known aboard ship that Gonzales had a fight with another crewmember, Andy Brown, in Durban, Africa.

R. 93, 112, 319: Gonzales threatened Boudoin; R. 291: and also the Third Mate.

R. 88: "He (Gonzales) was mean, a mean fellow. He just as soon pick a fight with anybody. He just as soon cut a man's throat . . . "

R. 117: "It was generally known that he (Gonzales) was placed in irons because he wouldn't get sober and was a dangerous character on the ship while he was drunk . . . "

R. 434-435: Gonzales admitted he was "gassed up" and/or "drunk," defining his condition thusly: "I consider drunk is when a man is staggering and falls down . . . gassed up, that is when a man drinks and gets enough . . . that is when he passes out, staggers and falls down and such as that."

R. 453-454: "They just drank more than I did. I (Gonzales) just drank until I don't know no more . . . I had enough."

R. 475: Referring to the events in Walvis Bay, Gonzales said, "I would say that I . . . I had enough . . . I was pretty . . . pretty drunk."

R. 298: Gonzales needed restraint, and was placed in irons, to prevent self-harm and his doing harm to anyone else.

[75]Rule 52, Federal Rules of Civil Procedure; 28 U.S.C.A.

the trial Judge "would have thought" about the instant matter if the case of *Jones v. Lykes* had been decided **prior** to the District Court's determination of this cause.[76]

This implies that *Jones* conflicts with *Keen*, which is not the case. The trial Judge's conclusions in the instant case should not be altered by the *Jones* case, and should be affirmed by Your Honors.

The aforesaid appellate conjecture about the influence of *Jones* on the District Judge flows from the intimation of the Court of Appeals for the **Fifth** Circuit that the Court of Appeals for the **Second** Circuit did reach inconsistent results in the *Keen* and *Jones* cases. The impression of inconsistency appears to rest upon the fact that while Jones' injuries resulted from a brutal assault, no less than did Keen's, nevertheless, Jones was denied recovery because no weapon was used and that, therefore, a **weapon** is essential. We submit that the results of these two cases are not inconsistent, because the cases are distinguishable on other facts: In *Keen* the assault was entirely **un**provoked; in *Jones* the victim criticized the assailant's work and thereby **provoked** the assault. The presence of a weapon is immaterial. This is emphasized through a holding recently made by the Court of Appeals for the Second Circuit in the assault case of *Kelcey v. Tankers Co., Inc., supra*, wherein a vessel was held **unseaworthy.** In *Kelcey* the **unprovoked** assault, **without a weapon** resulted in only **minor injuries** to the victim. It is clear then, that the **use of a weapon** and the **vehemence of the assault** are **not essential** to liability under the *Keen* doc-

---

[76]R. 507.

trine.[76A] Moreover, from *Kelcey* it can also be seen that in judging whether a seaman is equal in disposition to the ordinary man of the sea, one of the primary questions to be determined is whether or not the assault was **provoked** by the standards of a shipboard community.[77] If the assault is, **in fact, unprovoked,** the assailant should be presumed to be unequal to the ordinary man in the calling. Any other presumption disparages the entire American Merchant Marine.

Judged correctly under the *Keen* decision, Manuel Gonzales rendered the Steamship *Mason Lykes* **unseaworthy** and the conclusion of the trial Judge in this respect should be reinstated.

POINT II

RESPONDENT'S NEGLIGENCE UNDER THE JONES ACT

Boudoin's second claim is that Respondent is liable because it negligently failed to discharge its high degree of responsibility to furnish him with a safe ship and to protect him from abuse and ill treatment, resulting from disorder and lax discipline aboard the Steamship *Mason Lykes.*

Under the General Maritime Law, prior to the *Jones Act* and before *The Osceola*[78] a shipmaster, acting for the owner and through his subordinate officers, was legally bound

---

[76A] Even if a weapon is essential, a *weapon* is present in the instant assault: Gonzales used a *glass bottle* on Boudoin's head; R. 91.

[77] Jones v. Lykes Bros. Steamship Co., Inc., 204 F. 2d 815, 817 C.C.A. 2d, 1953).

[78] 189 U. S. 158, 23 S. Ct. 483, 47 L. Ed. 760 (1903).

to prevent abuse to a seaman from ill treatment and lack of order and discipline aboard ship.[79] This obligation to protect the seaman was analogized to the owner's duty to provide the crew with a *seaworthy* vessel.[80] Conversely, it was held that the seaman's right to be protected, is a right inherent in and incident to his contract of employment.[81]

After the decision of this Court in *The Osceola*, *supra*, the lower federal courts held that no recovery could be allowed for the failure of the vessel's officers to perform this obligation,[82] except where the person inflicting the ill treatment or abuse was of such despotic, dangerous and substandard disposition as to render the vessel *unseaworthy* by reason of his presence on board.[83]

Following passage of the *Jones Act*, these courts interpreted the failure of the vessel owner to protect the seaman from ill treatment as actionable *negligence* for which the seaman was allowed to recover damages.[84] It is now well established that a shipowner must respond in damages to a

---

[79]Gabrielson v. Waydell, et al.; The Lizzie Burrill; The Marion Chilcott; all *supra*, note 7.

[80]See The Marion Chilcott, *supra*, note 7.

[81]The Lizzie Burrill, *supra*, note 7.

[82]The Astral, *supra*, note 7.

[83]Rolph Navigation & Coal Co. v. Kohilas (The Rolph), *supra*, note 7.

[84]These cases seem to embody at least two factual situations: (1) general disorderliness aboard ship such as the encouragement and condonation of fighting by the officers; see Jensen v. U. S.; Stankiewicz v. United Fruit S. S. Corp., et al., *supra*, note 7; and (2) the presence on board the vessel of an officer or crewmember of *known* predisposition toward viciousness from past performances aboard the vessel with the failure of the officers to discharge or restrain such a crewmember; see Kyriakos v. Goulandris; Koehler v. Presque-Isle Transp. Co.; Montiero v. Paco Tankers, Inc., et al.; Nowery v. Smith; Hong v. U. S.; Carpenter v. Matson Navigation Co. (The Hamaqua); all *supra*, note 7. The second category of cases is more nearly applicable to the instant case, inasmuch as here Gonzales' vicious propensities were generally known. R. 86, 88-90, 114-115, 117-118.

seaman injured as a proximate result of lax discipline aboard ship.[85]

(a) *FORESEEABILITY*

In the instant case the trial Judge specifically predicated his conclusion of negligence upon failure of the officers of the Steamship *Mason Lykes* to suppress a drinking party aboard ship[86] in contravention of Shipping Articles and of Respondent's safety rules and regulations.[87]

A serious issue in regard to Respondent's negligence is whether Boudoin's injuries were the legally foreseeable consequences of the laxity of the vessel's officers in their enforcement of discipline and order aboard ship.

The trial Judge held that under the evidence Boudoin's injuries *were* foreseeable and, therefore, Respondent was negligent.[88]

It is with this conclusion of the trial Court that the appellate Court disagrees.[89]

---

[85]Ibid.
[86]R. 487; Trial Court's Conclusion No. 7; R. 480-481; Trial Court's Finding No. 4.
[87]R. 480-481; Trial Court's Finding No. 4.
[88]R. 487, Trial Court's Conclusion No. 7.
[89]R. 507, Opinion of the Court of Appeals:
"Search the record as one will, there is no substantial evidence upon which to rest a finding that any of the officers knew, or should have known, that anyone on board the ship was liable to be injured as a result of the drinking going on in the boatswain's room."
R. 508, Opinion of one Court of Appeals:
"It (the assault upon Boudoin) was the result of the entirely unforeseen and unforeseeable acts of Gonzales . . . " (Parenthetical phrase added.)

Under Rule 52,[90] the findings of the trial Court may not be set aside unless they are *clearly erroneous*. Therefore, this Honorable Court, sitting in the same position as the appellate Court below, may consider the evidence to determine whether the prohibition of Rule 52 has been transcended.[91] We submit that Rule 52 has been violated.

The following evidence support's the trial Court's conclusion that, having knowledge of the drinking aboard ship, the vessel's officers should have anticipated that untoward happenings such as the drunken Gonzales' tortious conduct were not unlikely to occur:

(1) Drinking aboard the ship, to *any* extent, was (a) a violation of Respondent's own safety rules,[92] (b) a violation of the Shipping Articles,[93] and (c) in contravention of the general prohibition of the Maritime law.[94]

(2) Nevertheless, during the late hours of the night before Gonzales assaulted Boudoin and during the early hours of the day of the assault, Gonzales and two companions engaged in a drinking bout aboard the ship in the crew's quarters.[95]

(3) During the course of this drinking party Gonzales

---

[90]Rule 52, Federal Rules of Civil Procedure; 28 U.S.C.A.
[91]McAllister v. U. S., *supra*.
[92]R. 136, 147-149, 326.
[93]R. 228, 243-244; Deft.-Pl. Ex. 18.
[94]18 U.S.C.A. 2196; 2 Norris, The Law of Seamen 493.
[95]R. 430-432.

drank almost a full bottle of whiskey, in addition to that which he drank ashore.[96]

(4) Gonzales became highly intoxicated during the shipboard drinking party.[97]

(5) Gonzales and his drinking companions became boisterous, to the extent that the noise of their revelry could be heard in the messhall and in the passageway running through the crew's quarters.[98]

(6) Gonzales had a general reputation aboard the ship for belligerence, especially when drunk.[99]

(7) During the hours of the drinking party one of the ship's officers was on watch with the duty of policing the ship by making routine inspections throughout the vessel.[100]

(8) During the time after midnight when Gonzales and the boatswain and the others were drinking, the watch officer frequently inspected the crew's quarters while the party was in progress there.[101]

(9) At some point at or near the end of the drinking bout, Gonzales entered Boudoin's room in the crew's quar-

---

[96]R. 436.
[97]R. 434-435 475.
[98]R. 78-79, 82-83.
[99]R. 88-90, 114-115; It is pertinent to observe with regard to Gonzales' reputation that Boudoin was not the only one who avoided him, (R. 79); but further, a fireman named Coutee who was even a "good buddy" and "friend" of Gonzales "wanted to get away" from Gonzales after having one drink with him aboard ship (R. 434).
[100]R. 81-82, 326.
[101]R. 105, 131-132; Pl. Ex. 5.

ters at which instant Boudoin, who had not taken part in the shipboard drinking party, was asleep or almost asleep in his bed.[102]

(10) When discovered, Gonzales, with a threat to kill, struck Boudoin on the head with a glass bottle[103] causing the injuries for which this action was brought.

These facts show that the vessel's officers failed to discharge their clear duty to enforce the regulations, order and proper discipline. As a result of their negligence and with their knowledge Gonzales proceeded to become irrational, irresponsible and criminally inclined. While in this condition he assaulted Boudoin without provocation.

Decisions involving indifference of shipboard authority to comparable and identical infractions of safety rules and discipline have held that the shipowner is liable to a seaman proximately injured by the unlawful, disorderly or undesirable condition.[104] In the instant case the condition was shipboard drinking and intoxication which is affirmatively discouraged by the general maritime law.[104A]

The reason for these holdings is clear: an employer, even ashore, does not discharge his duty to conduct his business safely merely by *promulgating* safety rules; in addition he is required to see that rules adopted as safety measures are

---

[102]R. 83, 112.
[103]R. 93, 112-113.
[104]Jensen v. U. S.; Stankiewicz v. United Fruit S. S. Corp., et al; both *supra*, note 7.
[104A]A seamen is denied even maintenance and cure if intoxication is proximately responsible for his illness or disability. 2 Norris, The Law of Seamen, p. 231-232, § 600.

effectively adhered to and enforced.[105] In a maritime setting, the captain must adequately provide for the safety of his crew;[106] and the express purpose of the *F.E.L.A.* is to "stimulate carriers to greater diligence for the safety of their employees."[107] The trial Court's findings should be reinstated.

Insofar as the instant appellate decision predicates its result on the doctrine of "foreseeability," the following observations become pertinent:

(1) The vessel's officers knowingly permitted a protracted violation of shipboard safety rules. This *laxity* constitutes Respondent's culpability, and the question of "foreseeability" should address itself not to the assault but to the failure of Respondent to suppress a violation of its own safety measures. Therefore, the question should be: *was harm foreseeable from the breach of this safety rule?* To ask the question is to answer it affirmatively.[107A] Otherwise, what *justification* exists, outside of a moral one, for the rule? In the instant circumstances, moreover, we have not only the employer's regulation but also the prohibition of the Shipping Articles and the maritime law generally, all denouncing shipboard drinking. Under the *F.E.L.A.* an employee whose violation of a safety rule *proximately* injures

---

[105] 35 Am. Jur., Master and Servant, § 154, p. 585.

[106] Gabrielson v. Waydell, et al.; The Lizzie Burrill; The Marion Chilcott; all *supra*, note 7.

[107] Jamison v. Encarnacion, 281 U. S. 635, 50 S. Ct. 440, 74 L. Ed. 1082, 1083 (1930).

[107A] If everyone is not familiar with the effect of alcohol on the brain and nervous system (R. 175), at least every man knows that proximate and natural results of alcoholic intoxication are the loss of inhibition, self-restraint and control. It is elementary that a drunk's unpredictable conduct may engender pernicious acts and wrongs against his fellowman, which sobriety would otherwise preclude.

him has his recovery diminished if not defeated.[108] Similarly, when the employer, or one of its employees, violates a statutory safety measure,**"causation"** *not "foreseeability"* is the determinative factor.[109] Should not the same legal approach appertain to the instant situation in view of the policy underlying the explicit expressions of the safety rule against shipboard drinking? The *cause* of the assault, in part at least, was drunkenness.

(2) Even if the Court of Appeals for the Fifth Circuit justifiably envoked the "foreseeability" doctrine, its view that the evidence does not support recovery disregards the significance of record proof, namely: those facts which support the conclusion that injury to a crewmember was not only foreseeable but quite likely in view of Gonzales' boisterous manner and his general reputation for violence especially when drunk.[110] Furthermore, it is not legally required that Respondent, through its ship's officers, should have been able to anticipate the specific assault on Boudoin before liability can be imposed. It is generally agreed that "foreseeability," in the legal sense, does *not* mean that the negligent party must anticipate or foresee the consequence of his act or omission in the *exact form* in which it ultimately occurs. It suffices that the alleged negligent actor should have anticipated only that *some* injury, harm or mischief might result from his act or omission, even though the particular injury or consequence resulting (in this case Gon-

---

[108]See Hylton v. So. Ry. Co., 87 F. 2d 393 (C.C.A. 6th, 1937) and cases cited therein.

[109]Carter v. Atlanta & St. A. B. R. Co., 338 U. S. 430, 70 S. Ct. 226, 94 L. Ed. 236.

[110]*Supra*, notes 96-99.

zales' assault upon Boudoin) was not foreseeable in its precise, final form.[111] The *legal* test of "foreseeability" has been met in the instant case.

(b) *SAFE PLACE TO WORK*

It was the duty of Respondent to furnish Boudoin with a safe place in which to work; in a maritime setting this includes a safe place to sleep and rest.[112] A seaman by reason of the nature of his calling is legally entitled to exact a higher degree of care from his employer than a shoreside worker.[113] Having knowledge of the dangers created by the prolonged drinking and especially by one whom Respondent knew or should have known to be particularly dangerous when drunk, Respondent cannot avoid liability, for its failure to keep the vessel safe, by its assertion that the *wilful acts of the other employee* (Gonzales) *contributed* to Boudoin's injuries.[114] By exposing Boudoin to the unconventional, irresponsible and even unpredictable conduct of drunken seamen, Respondent neglected to discharge its legal duty to provide and maintain a safe vessel.

A seaman's forecastle, where he lives, is his "castle."[115] It is regarded as his home and it is a tradition of the sea that he is entitled to defend it.[116] The assailant intruded into

---

[111]Pease v. Sinclair Ref. Co., 104 F. 2d 183 (C.C.A. 2d, 1939).
[112]Hern v. Moran Towing & Transportation Co., Inc., 138 F. 2d 900 (C.C.A. 2d, 1943); Rey v. Colonial Navig. Co., 116 F. 2d 580 (C.C.A. 2d, 1941).
[113]Koehler v. Presque-Isle Transp. Co., 141 F. 2d 490 (C.C.A. 2d, 1944).
[114]Lillie v. Thompson, 332 U. S. 459, 68 S. Ct. 140, 142, 92 L. Ed. 73 (1947).
[115]R. 439.
[116]R. 347.

Boudoin's forecastle while he was asleep and assaulted him. As the Chief Mate testified, this was surely no accident and supposedly someone is at fault and to blame.[117] How widespread is respondent's negligence? Can its representatives be excused by passing the baton of responsibility? A cumulative effect may result from respondent's many laxities, which, in the chain of events, may be charted from this assailant up to the ship captain:

Maintenance-man Gonzales: The first and lowest link in the chain is the assailant. He is a man who habitually drinks himself into irresponsibility, not only ashore with strangers in a foreign port[118] but also with friends aboard his own ship;[119] given to threats[120] and fighting;[121] absenting himself without leave from his vessels;[122] requiring incarceration aboard his ships.[123]

Boatswain Oswald: This highest ranking unlicensed member of the ship's personnel residing in the crew's quarters was derelict in abetting instead of discouraging his subordinate maintenance-man, Gonzales, in bringing whiskey aboard ship and drinking it in the boatswain's own quarters[124] in violation of the captain's orders[125] and the shipping articles,[126] the boatswain continuing in his negligent

---

[117]R. 372.
[118]R. 453.
[119]R. 434-436, 475.
[120]R. 93, 112-113, 291, 322.
[121]R. 86, 89-90, 458.
[122]R. 304, 472.
[123]R. 293, 472.
[124]R. 430.
[125]R. 326-325.
[126]R. 136.

dereliction until he passed out drunk.[127]

Gangway Watch: It was part of the routine duty of the crewmember assigned to the gangway watch that he should report to the watch officer if a badly intoxicated seaman came aboard,[128] which he neglected to do probably because the Chief Mate failed to so instruct him[129] or because he was not watching the gangway.[130]

Third Mate Brock: This officer, who had the duty of the watch and made frequent inspections of the crew's quarters,[131] negligently failed to suppress the drinking party.[132]

Chief Mate Staggers: This officer, who ranks immediately below the master, knowingly tolerated the infraction of the rules against bringing and consuming liquor aboard the ship,[133] and even he, himself, occasionally brought whiskey aboard.[134]

Captain Townsend: This shipmaster has the non-delegable responsibility for maintaining decorum aboard the vessel, at sea or in port.[135] He placed the responsibility on the watch officer to maintain peace aboard the vessel;[136] and he would neither expect nor want other crewmembers to report that Gonzales was drinking intoxicants aboard the

---

[127]R. 80.
[128]R. 324.
[129]R. 383.
[130]R. 430.
[131]R. 105.
[132]R. 480-481; Trial Court's Finding No. 4.
[133]R. 383.
[134]R. 384.
[135]R. 222.
[136]R. 326.

ship, as he did not regard it as the crewmembers' duty to see that the ship's regulations should be enforced.[137] It never occurred to this captain that a drunk man coming aboard the ship ought to be watched in order to prevent him from doing harm to another person, and the master never ordered such precaution.[138]

Nor does Respondent's indifference end at the "water line":

Assistant Manager of Insurance and Claims Division Beyer: He has an index and card system concerning men who were "performers" or were guilty of misconduct,[139] including information covering assaults on fellow crewmembers.[140] The laxity of his surveillance is demonstrated by the fact that although he has a record on Gonzales concerning a minor injury to his elbow on which no claim was made,[141] there was no entry pertaining to any act of misconduct on Gonzales' part, nor his intoxication, nor his missing watches, nor his going ashore without permission, nor his fines and loggings, nor his being placed in irons after the Boudoin incident.[142]

Assistant Manager of Marine Division Biggers: He would consider as a safe man to employ aboard his company's vessel one who attacked another crewmember and seriously injured him with a glass bottle, if there was no complaint

---

137R. 326.
138R. 325.
139R. 247.
140R. 253.
141R. 250.
142R. 249.

about that man;[143] and he knew there was no certainty that the hiring hall through which the seamen were employed would screen the men, and that the union would not assume the responsibility of determining the acceptability of those men who were unfit.[144]

Vice-President Jimison: Respondent's corporate officer reveals the laxity of the company, in its policy and enforcement, by the fact that Gonzales was not rejected for employment even after his offense against Boudoin.[145] Notwithstanding that his shipmaster of the Steamship *Mason Lykes*, Captain Townsend, had fired Gonzales after the Boudoin incident because that finished Gonzales and the captain would not have him aboard his vessel,[146] nevertheless this shipping company re-employed the assailant, Gonzales, on several of its other vessels up to the time of trial.[147] This laxity and indifference of the company for the safety of its employees is highlighted by the fact that this company apparently did not know at the time the case was being heard by the trial Judge[148] that the assailant, Gonzales, was in its employ aboard one of its vessels.[149]

The foregoing reveals that the sum total of respondent's actions and inaction toward the safety of its employees is the antithesis of the goal of the *F.E.L.A.* whose purpose is to stimulate carriers to greater diligence in protecting employees from personal injury.[149A]

---

[143]R. 216.
[144]R. 210.
[145]R. 143, 216.
[146]R. 324.
[147]R. 215.
[148]R. 225-226, 263-264.
[149]R. 419.
[149A]Jamison v. Encarnacion, *supra*, note 107.

(c) LIABILITY FOR ASSAULT BY SUBORDINATE EMPLOYEES

The case at bar involves an assault by one unlicensed crew member upon another and the opinion under review has held, in effect, that " . . . a shipowner is not to be held liable for an assault unless: (1) it is committed by a superior on a subordinate in carrying out the ship's work; . . ."[150]

Such a holding is contrary to the decision of this Court in *Steely v. Kurn.*[151]

The Court of Appeals for the Fifth Circuit apparently based its holding upon the construction which earlier decisions[152] have given to the decisions of this Honorable Court in *Jamison v. Encarnacion*[153] and *Alpha S. S. Corp. v. Cain,*[154] which did involve the factual situation of a "superior-subordinate" assault.

However, in the *Steely* case a petition for *certiorari* was presented in an *F.E.L.A.* case wherein a railroad employee was **wilfully** injured by another employee of **equal station.** Instead of attacking the victim with a "weapon" as that

---

[150]R. 503 and note 2 thereon.
[151]Steely v. Kurn, 313 U. S. 545 (1941).
[152]Kable v. U. S., 169 F. 2d 90 (C.C.A. 2d, 1948); Pittsburgh S. S. Co. v. Scott, 159 F. 2d 373 (C.C.A. 6th, 1947); Brailas v. Shepard S. S. Co., 152 F. 2d 849 (C.C.A. 2d, 1945); Lykes Bros. S. S. Co., Inc. v. Grubaugh, 128 F. 2d 387 (C.C.A. 5th, 1942); Yukes v. Globe S. S. Corp., 107 F. 2d 888 (C.C.A. 6th, 1939); Escandon v. Pan-American Foreign Corp., et al., 88 F. 2d 276 (C.C.A. 5th, 1937); Nelson v. Am.-West African Line, Inc., 86 F. 2d 730 (C.C.A. 2d, 1936); and see Bonsalem v. Byron S. S. Co., Ltd., 50 F. 2d 114 (C.C.A. 2d, 1931).
[153]Supra, note 7.
[154]Ibid.

term generally implies, the assailant used a piece of equipment, which both men happened to be carrying at the time, to inflict the battery. The employer succeeded in convincing the state courts, in which the action was tried and appealed, that since the assault was **wilful,** and **not committed by a superior** upon his subordinate to speed the work or reprimand the subordinate, the employer was not liable for "negligence" under *Jamison* and *Alpha S. S. Corp.* Obviously, if these latter decisions applied **only** to the factual situation contained in them, the position of the railroad in the *Steely* case would have been well taken. But, in *Steely*, this Honorable Court granted the application for the *writ* and, by a *per curiam* opinion, reversed and remanded the case, citing as authority only *Jamison v. Encarnacion.* It appears, therefore, that with the *Steely* decision, this Honorable Court has viewed with disapproval the prior jurisprudence which gave to *Jamison and Alpha S. S. Corp.*, a restrictive application. Such a view is certainly well justified.

In *Jamison,* the Court reasoned (a) that the injuries to the assaulted subordinate arose out of the employment, during which the employer would, unquestionably, have been liable for the same injuries if "negligently" inflicted by the superior employee; and (b) that, therefore, the spirit and purpose of the *Jones Act* require that liability result from a **wilful** act injuring the employee in the course of his employment.[155]

Therefore, *Steely v. Kurn* can be said to stand for the proposition that the employer will be liable, even for wilful in-

---

[155]Ibid.

juries, if he would have been liable had the injuries been inflicted by carelessness of the offending employee, provided the victim is in the scope of his employment.

In the instant case, Boudoin was in the course of his employment, even though he was resting and not actually working when injured.[156] As has been observed, by the very nature of his employment the ship was his "home;" it has been held that rest and recreation are part of a seaman's service of the ship, essential to his ability to withstand the rigorous demands of his calling.[157] Boudoin was not at liberty to leave the ship in this foreign port without the permission of the captain;[158] he was subject to call at any time that circumstances required his actual physical labor; and he bound himself to abide by all such lawful commands during the voyage.[159] Also the assailant in the instant case, by the nature of the employment, was required to "live on the job." At the time of the assault, or for several hours immediately prior thereto, Gonzales was engaged in "recreation" (unlawful though it was)[160] aboard the vessel. Injuries aboard ship, arising out of recreation, are held to occur in the course of employment when they were **carelessly**

---

[156]See Sundberg v. Washington Fish & Oyster Co., 138 F. 2d 801, 803 (C.C.A. 9th, 1943) and cases cited therein.

[157]Farrell v. U. S., 336 U. S. 511, 69 S. Ct. 707, 93 L. Ed. 658 (1949); Aguilar v. Std. Oil Co. of N. J., 318 U. S. 724, 63 S. Ct. 930, 87 L. Ed. 1107 (1943). Calmar S. S. Co. v. Taylor, 303 U. S. 525, 58 S. Ct. 651, 82 L. Ed. 993.

[158]R. 228, 243-244, Deft.-Pl. Ex. 18.

[159]Ibid.

[160]See Ford v. United Fruit Co., et al., 171 F. 2d 641 (C.C.A. 9th, 1948), wherein the offending seaman was engaged in recreation *not* in violation of any ship rules governing the conduct of seamen or other persons aboard the vessel.

inflicted.[161] Therefore, under *Steely v. Kurn*, applying the *Jamison* case, the wilful injuries to Boudoin by another employee of equal station should impose liability upon Respondent.

It cannot be overlooked that this interpretation of the *Steely* decision creates somewhat of an incongruity between that decision and the one in *Davis v. Green*,[162] decided prior to *Jamison* and upon facts opposite of it, that is, in the *Davis* case a subordinate assaulted his superior. It is submitted however, that the *Steely* case embodies the proper rule and better accords with the intent and purpose of these federal statutes.

Furthermore, the *F.E.L.A.*, by its letter, may be said to refer to two bases of liability, to wit: (1) liability for *negligence of employees;* and (2) liability for the *carrier's own negligence.*[163] If the first, *negligence of employees,* be given its **broadest** meaning at common law, as indicated in *Jamison v. Encarnacion,* the term "negligence" should **not exclude wilful torts** by one employee against another. The statutes and the *Steely* case, should be construed to impose liability upon the employer in any case where the **assailant, himself, would have been liable at common law,** provided

---

[161]Sundberg v. Washington Fish & Oyster Co., *supra*, note 156.
[162]260 U. S. 349, 43 S. Ct. 123, 67 L. Ed. 299 (1922).
[163]45 U. S. C. A. 51.

the victim is in the course and scope of his employment when injured.[164] The test of what the assailant was doing at the time should not be used as a basis of liability because, as one recent commentator has observed, even when a negligent employee acts **inadvertently,** he is not furthering the interests of his employer.[165] Of course, in the instant case, Gonzales' so-called recreation was no less a part of the employment than was Boudoin's rest and, in that sense, both employees were in the service of their ship, i.e., in the course of their employment. This fact strengthens the proposition that liability should be imposed here upon a theory of the "direct negligence" or wilful tort of the **employee,** rather than denied under a doctrine of **"respondent superior,"** since the *Jones Act* and the *F.E.L.A.* require that the **injured employee only** be "in the course of his employment" or be "employed" at the time of the injury.

Respondent herein should be held liable for the actions of its employee, Gonzales, including for his assault upon Boudoin.

---

[164] In the absence of such an interpretation, i.e., with a rigid adherence to *Davis v. Green* and those cases restricting *Jamison* to its facts, a strange anomaly results, *viz:* "Two seamen are performing the job of carrying a piece of equipment; out of sheer malice one drops his end on the other seaman; under *Steely v. Kurn* the employer is liable. The same two seamen do the same job and *place the equipment at rest;* out of the same sheer malice, one manages to lift the object again and drops it on his shipmate; under *Davis v. Green,* the employer is *not* liable."

[165] 40 Va. L. Rev. 599, 614 (1954).

CONCLUSION

It is respectfully submitted that under the principles of the General Maritime Law the Steamship *Mason Lykes* was unseaworthy by reason of the presence aboard and actions of the defective seaman Gonzales, and that under the statutory provisions of the *Jones Act* the respondent shipping company and its representatives were negligent in the particulars hereinabove set forth. Therefore, plaintiff is entitled to recover damages for his resultant injuries. We further submit that the findings and conclusions of the District Court regarding liability should be reinstated, and that this cause should be remanded to the Court of Appeals for the Fifth Circuit for further proceedings on the question of *quantum*.

RAYMOND H. KIERR
Attorney for Appellant
1746 National Bank of
Commerce Building
New Orleans 12, Louisiana

SAMUEL C. GAINSBURGH
Of Counsel

January, 1955

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
FEB 9 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of The United States

October Term, 1954

No. 406

ELIE J. BOUDOIN,
Petitioner-Appellee Below

versus

LYKES BROS. STEAMSHIP CO., INC.
Respondent-Appellant Below

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

RAYMOND H. KIERR
1746 National Bank of
Commerce Building
New Orleans 12, Louisiana
Attorney for Appellant

SAMUEL C. GAINSBURGH
Of Counsel

TABLE OF CONTENTS

	Page
Index of Authorities	1
Regarding the Facts	1
Regarding the Law	7
Conclusion	10

INDEX OF AUTHORITIES

Cases:

Jones v. Lykes Bros. Steamship Co., Inc., 204 F. 2d, 815 (C. C. A. 2d, 1953)	5, 6, 7,
Keen v. Overseas Tankship Corp., 194 F. 2d 515, 518 (C. C. A. 2d, 1952)	5
Kelcey v. Tankers Co., Inc., 217, F. 2d	5
Lopoczyk v. Chester A. Poling, Inc., 152 F. 2d 457, (C. C. A. 2d, 1945)	3
Palmer v. Hoffman, 318, U. S. 109, 63 S. Ct. 477, 87 L. Ed. 645 (1943)	3
Stankiewicz v. United Fruit Steamship Corp., et al. 123 F. Supp. 714	5
Thompson v. Coastal Oil Co., 119 F. Supp. 838	5

Other:

Industrial Relations in the Ocean Shipping Industry, Report of Industrial Relations Counselors, Inc.	6

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1954

NO. 406

ELIE J. BOUDOIN,
Petitioner-Appellee Below
versus

LYKES BROS. STEAMSHIP CO., INC.
Respondent-Appellant Below

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

MAY IT PLEASE THE COURT:

Most of the arguments contained in respondent's brief have been traversed in petitioner's original brief. Several of respondent's allegations, however, require comment:

REGARDING THE FACTS

(1)

At page 23 of its brief respondent states that an assertion contained in petitioner's brief under his "Statement of Facts," namely, "Leaving Boudoin's living quarters Gon-

zales armed himself with a butcher knife," is a confection derived entirely from statements attached to the vessel's log book which were excluded from evidence by the District Court.

Respondent's representation is inaccurate.

Petitioner testified specifically at the time of trial in open court, referring to the assailant, that *"he went forward and got a butcher knife after me."*[1] Petitioner's unchallenged testimony proving this fact is supported by the testimony of the shipmaster, Captain Townsend, who testified on cross-examination that during the course of his investigation on the date of the assault for purposes of the official report on ship's business, it was reported to him by Third Mate Brock that the assailant, Gonzales, was met with a large knife in his hand.[2] Although the captain was not present at the knife incident, his investigation of the matter thereafter disclosed, and he so testified, that, "There is no doubt that the knife was taken away from him at that time."[3]

(2)

At page 33 of its brief respondent insists that "the district court predicated a good part of its findings on certain unsworn statements which the district court had itself correctly excluded." Respondent's criticism is unwarranted.

---

[1]R. 114.
[2]R. 315.
[3]R. 316.

Firstly, respondent refers to no specific fact (unless respondent had in mind its aforesaid erroneous observation about the knife) which is based solely on the log book appendages.

Secondly, although the findings of the trier of the facts are amply supported by evidence other than the written statements, it is submitted that these written statements are at least corroborative and, therefore, should not be disregarded. Furthermore, the written statements in question are admissible under the Business Entries Statute,[4] as the District Judge may well have found upon reading the captain's desposition which demonstrates that the statements are, in fact, a part of the official log. An examination of the official log book[5] of the *Steamship Mason Lykes* and the testimony of its shipmaster, Captain Townsend,[6] discloses that the said statements are integral parts of the official log book and, by incorporation, comprise an official log entry.[7] A ruling at this time on the point raised by respondent would be helpful, regardless of whether or not the trial court ultimately excluded the statements.[8]

---

[4] 28 U.S.C.A. §1732.

[5] R. 291; see also R. 242; pl. ex. "U. S. Coast Guard."

[6] R. pp. 310, 315, 318-319, 323.

[7] *Lopoczyk v. Chester A. Poling, Inc.*, 152 F. 2d 457 (C. C. A. 2d, 1945) holds that a master's official log entry relative to an incident occurring aboard his vessel is admissible in evidence, especially where it is not self-serving or the outgrowth of any prejudice in favor of the party offering it, so as to fall within the prohibition of *Palmer v. Hoffman*, 318, U.S. 109, 63 S. Ct. 477, 87 L. Ed. 645 (1943).

[8] The precise nature of these statements was explained by the captain when he testified that they were a part of his official investigation and log entry. This testimony, in the form of a deposition, was introduced subsequent to the court's exclusion of the statements. The deposition was not read to, but was read by the court, following the date of the trial, and, therefore, it is not unlikely that the district judge may ultimately have decided after reading the depositions that these statements comprised an admissible log entry; *Supra*, Note 6.

(3)

At pages 22 and 23 of its brief respondent argues that the assailant's belligerent reputation is not established because petitioner's testimony does not prove this fact. Respondent quotes the transcript of the record[9] wherein the District Judge interrogated petitioner by asking him what other people *thought* about Gonzales; to this question petitioner replied "Well, what other people *think* about him, that is pretty hard to say, Your Honor." A reference to the full context of this portion of the record will disclose that the questions and answers immediately following those quoted by respondent at least support the permissible inference that the assailant had a general reputation for belligerence.[10]

---

[9]Respondent's brief, p. 23, footnote 84.

[10]R. 89, where the record reads:

"A. Well what other people think about him, that is pretty hard to say, Your Honor.

Q. Well, do you know what the other fellows on the ship thought about him?

A. The other fellows talking about him. I think they didn't think very much about him, because he always bullying like that.

Q. Did he ever have any fights on this ship?

A. Yes, sir. He had one with my roommate, Andy Brown, in Durban.

Q. Was it generally known on board the ship that this man had a fight with Brown?

A. Yes, sir.

Q. Did Gonzales tell the crew about any other fights he had?

A. Yes sir. He always telling about how he hit them here in New Orleans before he got on the ship, and how many policemen he beat up and run off there."

The foregoing prior performances on the part of Gonzales are sufficient to support a finding of unseaworthiness even if, as respondent advocates, knowledge of prior misconduct is essential. Therefore, contrary to the assumption of respondent at page 11 of its brief, petitioner does not concede that approval of the *Keen* doctrine is indispensable to respondent's liability.

(4)

At pages 15 to 20 of its brief respondent paints the *Keen* doctrine as undesirable because of its alleged subversive potential toward the American maritime industry. This is an echo of the cry of alarm heard during the evolution of the *Keen* decision.[11]

It cannot be overlooked that during the three years since the appellate decision in *Keen* the American Merchant Marine did not "go fold up."[12]

In its brief the respondent indulges itself in mathematical figures which bear analysis:

(a) At page 19 respondent asserts that in 1939 an able-bodied seaman's average monthly earnings were only $82.00, whereas today they are over $525.00. Respondent makes this observation for the apparent purpose of demonstrating that the seaman's lot has gone from the ridiculous to the sublime. Respondent overlooks the fact that in order to earn $525.00 in any particular month the seaman must work the maximum hours of *overtime* because his base wage is

---

[11] *Keen v. Overseas Tankship Corp.*, 194 F. 2d 515, 518 (C. C. A. 2d, 1952); "The American Merchant Marine could go fold up if we ever imposed an obligation of that sort on them." The fallacy of this prediction was emphasized and explained by Judge Learned Hand in his *Keen* opinion.

[12] It is interesting to note in four cases which our research discloses to have been predicated on the theory expressed in *Keen*, that in two of the cases recovery was denied to the plaintiffs, *Jones v. Lykes Bros. Steamship Co., Inc.*, 204 F. 2d 815, and *Stankiewicz v. United Fruit Steamship Corp., et al.*, 123 F. Supp. 714, and that in the remaining two cases the seamen recovered an aggregate of less than twenty thousand dollars, *Kelcey v. Tankers Co., Inc.* 217, F. 2d, and *Thompson v. Coastal Oil Co.*, 119 F. Supp. 838.

actually $314.41 per month.[13] Also, it is obvious that in order for a seaman to average these monthly earnings on an annual basis he must be continuously employed throughout the year. It is the exception rather than the rule for a seaman to work during all of any given year, because of such factors as rotary shipping, the lay-up and repair of vessels, and the very nature of the calling; moreover, as conditions have improved many seamen have been able to acquire families and homes from which they are naturally reluctant to be continuously separated. From the foregoing it may be concluded that (1) the betterment of the seaman's lot is not as phenomenal as respondent would imply; and that (2) such betterment and improvement, as have been accomplished, redound to the advantage of the shipowner and the nation by making the seafarer's calling more attractive to those creditable men who would follow the sea.

(b) At page 16 respondent states that in *Jones v. Lykes Bros. Steamship Co., Inc.* the seaman, Jones, who was denied recovery for damages, actually recovered in maintenance over $11,500.00. We are informed that this seaman, Jones, did not *recover* the sum stated, but was paid that amount in *compromise* of his claims, not only for maintenance, but also for *damages* resulting from the shipowner's failure to meet its maintenance obligation.

---

[13] *Industrial Relations in the Ocean Shipping Industry*, Report of Industrial Relations Counselors, Inc., to Maritime Industry Survey Committee, (1953).

REGARDING THE LAW

(1)

At page 13 of its brief respondent criticizes petitioner's analysis of the *rationale* of the *Jones* and *Keen* cases, stating that "petitioner's brief in this court somehow gets the two cases hopelessly mixed up and exactly reversed." Respondent's statement may better serve as a confession rather than an accusation. Respondent's confusion stems from its erroneous reading of the *Jones* case, from which respondent specifically states at page 13 that "*in Jones, the injured party did not provoke the assault and did not recover.*" Respondent attempts to support this erroneous statement by a quotation from the *Jones* case, contained in footnote 44 at page 13 of its brief. The quoted finding is that of the District Judge in the *trial court*,[14] which *allowed* recovery on the basis of an *un*provoked assault. The *appellate* court did not find, as the District Judge did, that the assault on Jones was *un*provoked. The *appellate* court, therefore, *denied* recovery.

In summary, it was the *trial* court which made the finding quoted by respondent that there was no provocation for the assault and awarded the plaintiff damages. This, of course, was consistent with our original position that provocation may be one of the essential factors for determining liability under the *Keen* rule. The appellate court in the *Jones* case, in denying the plaintiff his damages, con-

---

[14] *Jones v. Lykes Bros. Steamship Co., Inc.*, 108 F. Supp. 323, 324 (D.C.S.D.N.Y., 1952) being Finding of Fact No. 6 of the District Judge, quoted as such by the appellate court, *Jones v. Lykes Bros. Steamship Co.*, 204 F. 2d 815, 816 (C. C. A. 2d, 1953).

cluded that the trial court's finding of no provocation for the assault had been made with an improper regard for the conditions of a shipboard community. The court further observed that while *Jones'* actions toward his assailant might have been insufficient provocation to a shoreside worker for a personal encounter, a shoreside worker's attitude was not the measure of the disposition of the ordinary man who follows the *sea*. The plain meaning of this appellate view is that the assault was provoked by shipboard standards. Therefore, the *appellate* opinion in *Jones* also accords with petitioner's emphasis on provocation in determining liability under the *Keen* rule.

(2)

At page 13 of its brief respondent states:

> "In *Keen*, the injured party *provoked* the assault and *recovered damages*." (Emphasis added)

This statement is erroneous in two respects:

(a) *Keen* did not recover damages, as far as we know; the lower court had entered judgment on a verdict for the *defendant* and the Court of Appeals reversed and remanded the case for a new trial.

(b) The *issue* of provocation was not decided. Assuming the alleged finding of the appellate court (that " . . . Keen knocked down Mruczinski with his fist") to be part of the *rationale* of the *Keen* decision it does not follow that the subsequent murderous blow with a meat cleaver was thereby provoked. While a fist might provoke a defensive or even a retaliatory *fist* it may not be sufficient to provoke a

calculated attempt to kill with a deadly weapon, perpetrated in an atmosphere of ambush. From the foregoing it logically follows that provocation is a matter of degree and is a conclusion of fact to be drawn with proper regard for the attending circumstances in any given case.

(3.)

At page 14 of its brief respondent states:

> "Seaworthiness" of personnel, . . . can only be determined by prior conduct, and "unseaworthiness" can only be deduced from prior misconduct."

This statement erroneously proceeds upon the premise that one act of depraved violence on the part of a seaman is not an indication of his personality and temperament. While it may be taken as true for present purposes that sailors lead a rough life, so it may be with stevedores, professional athletes, pugilists, and others. In these groups, as with seamen, a sense of "natural fairness" is not lacking. If this rule of natural fairness is breached this fact can readily be determined *after* the breach has occurred. No prior performance is necessary to arrive at the conclusion that the offender acted in an unaccepted manner.

The warranty of seaworthiness to a seaman has never been conditioned upon the shipowner's knowledge of prior defects in hull, gear and appliances. If this Honorable Court concludes that the warranty extends to the dispositional competence of the crew, prior misconduct should not be a sacramental element of liability. Prior performance may well serve as an indication of the seaman's alleged defective disposition, but it is not the *sine qua non*.

Perhaps respondent's mistaken emphasis on prior misconduct is a by-product of its acquaintance with the general tort concept that "every dog is entitled to one bite" before his owner can be held responsible for the animal's antisocial behavior. This tort axiom is predicated upon a theory not present in the warranty of seaworthiness, namely, that a tortfeasor is legally responsible for *negligence* only where its consequences are reasonably foreseeable. In the dog-bite situation the law reasons that if the dog has never bitten before, its owner, whose liability is predicated upon foreseeability, cannot foretell that the animal is vicious until after the "first bite." Under the General Maritime Law, however, the shipowner is legally responsible on the very first occasion that the defect evidences itself.

CONCLUSION

It is respectfully submitted that, for the foregoing reasons and those set forth in petitioner's original brief on the merits of this cause, the findings and conclusions of the District Court regarding liability should be reinstated, and that this cause should be remanded to the Court of Appeals for the Fifth Circuit for further proceedings on the question of *quantum*.

RAYMOND H. KIERR
Attorney for Appellant
1746 National Bank of
Commerce Bldg.
New Orleans 12, Louisiana

SAMUEL C. GAINSBURGH
Of Counsel

PETITION NOT PRINTED

Office - Supreme Court, U. S.
FILED
AUG 9 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1954

No. ~~95 Misc.~~ 406

ELIE J. BOUDOIN,

Petitioner

vs.

LYKES BROS. STEAMSHIP CO., INC.,

Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI

JOSEPH M. RAULT
COUNSEL FOR RESPONDENT

TERRIBERRY, YOUNG, RAULT & CARROLL
ANDREW R. MARTINEZ
WILLIAM E. WRIGHT
OF COUNSEL.

TABLE OF CONTENTS

Page

Questions Presented 1
Statement of the Case 2
Argument

Point 1.—The Ruling of the Court of Appeals that the Respondent was not Negligent is Correct 4

Point 2.—The Ruling of the Court of Appeals that the Vessel was not Unseaworthy is Correct 8

Conclusion 11

CASES CITED

Brailas v. Shephard Steamship Co., 1946 A.M.C. 51, 1952 F. (2d) 849 (C. C. A. (2d) 1945) 8

Hurley v. The Lizzie Frank, 31 F. 477 (D. C. Ala. 1887) 8

Jackson v. Pittsburgh S. S. Co., 131 F. (2d) 668 (C. C. A. (6th) 1942) 7

Jensen v. United States, 184 F. (2d) 72, 1950 A.M.C. 1797 (C. C. A. 3) 6

Jones v. Lykes Bros. Steamship Co., Inc., 204 F. (2d) 815 9

Kable v. United States, 1948 A.M.C. 1595, 169 F. (2d) 90 (C. C. A. 2) 8

Keen v. Overseas Tankship Corp. 1952 A.M.C. 241, 194 F. (2d) 515, (C. C. A. 2) 8

Koehler v. Presque-Isle Transportation Co., 141 F. (2d) 490, 1944 A.M.C. 432 (C. C. A. 2) 6

CASES CITED

Page

Kyriakos v. Goulandris, 151 F. (2d) 132, 1945 A.M.C. 1041 (C. C. A. 2) 8

Lykes Bros. Steamship Co., Inc., v. Grubaugh, 1942 A.M.C. 1305, 128 F. (2d) 387 (C. C. A. 5) 8

Naylor v. Isthmian S. S. Co., 187 F. (2d) 538, (C. C. A. (2d) 1951) 7

Pittsburgh v. Palo, 46 F. (2d) 198 (C. C. A. (6th) 1933) 7

Reynolds v. Atlantic Coast Line R. Co., 196 F. (2d) 643 (C. C. A. (5th) 1952) 7

Rolph, The, 299 F. 52, 1924 A.M.C. 942 (C. C. A. 9) 8, 9

Ward, E. W., Jr., 20 F. 702 (1344) 8

Yukes v. Globe Steamship Corporation, 107 F. (2d) 888 (C. C. A. (6th) 1939) 8

Hughes on Admiralty, 2nd Ed. (1920) 8

Norris, The Law of Seamen, Volume 2 (1952) 8

46 U. S. C. A 688 7

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1954

No. 95 Misc.

ELIE J. BOUDOIN,

Petitioner

vs.

LYKES BROS. STEAMSHIP CO., INC.,

Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

This case presents the following questions:

1. Is the decision of the United States Court of Appeals for the Fifth Circuit in conflict with the holdings of other circuit courts?

2. Is the respondent liable for negligence under the Jones Act for an assault committed by one seaman upon another seaman when the assault:

(a) was wholly unconnected with work aboard respondent's vessel;

(b) the assailant had no authority or control over the victim; and

(c) the assailant had not been guilty of any prior misconduct whatsoever aboard the vessel so that the ship's officers did not have and could not have had any actual or constructive knowledge that he was likely to injure anyone?

3. Is the respondent's vessel unseaworthy when the assailant did not possess known vicious traits?

STATEMENT OF THE CASE

The petitioner was employed aboard the respondent's SS MASON LYKES in the capacity of oiler during a foreign voyage which commenced from and ended in New Orleans between September 6, 1949 and December 19, 1949.

During the late hours of November 24, 1949 (Thanksgiving Night) and early hours of November 25, 1949, three unlicensed crewmen, off duty and having no work to perform until the next morning, were in the forecastle of the boatswain talking and having drinks. One of the men was Manuel Gonzales, the alleged assailant involved in this case.

Petitioner had been drinking ashore on the afternoon of November 24th, and, upon returning to the vessel, had gone

to bed about 5:00 p. m. that day. About 2:00 a. m. on the morning of November 25, 1949, while petitioner was asleep or almost asleep in his bed, Gonzales left the boatswain's room and went into the room of petitioner to obtain a bottle of brandy from under petitioner's bed. When petitioner was startled in the semi-darkness by the shape and person of Manuel Gonzales close to his bed, he arose from his bed and accosted Gonzales, whereupon Gonzales struck him on the back of the head with the bottle which he, Gonzales, had taken. As a result of the blow on the head, petitioner suffered personal injuries for which the District Court awarded damages and maintenance. The maintenance part of the judgment was paid, and the respondent appealed from the damage award to the Fifth Circuit Court of Appeals.

The Circuit Court reversed the judgment of the District Court and held that the respondent was not negligent because: (1) the officers of the ship did not have actual or constructive knowledge that the assailant had been drinking aboard the ship; (2) the officers did not know and had no reason to believe that anyone aboard the ship was likely to be injured as a result of the three men drinking in the boatswain's room; (3) the record does not contain substantial evidence to support a finding that any of the officers knew, or should have anticipated, that the assailant would attack and injure a fellow crewman; (4) the vessel was not unseaworthy because the officers of the ship did not know or have reason to believe that the assailant possessed a violent or belligerent disposition; and (5) that the assailant did not in fact possess such a disposition.

Although the Fifth Circuit Court did not accept the so-called principle of the Second Circuit decision of *Keen vs.*

Overseas Tankship Corp. (discussed hereafter), in view of the later Second Circuit decision of *Jones vs. Lykes Bros. Steamship Co., Inc.* (also discussed hereafter), the decision herein, in its conclusion and holding, is in accord with the Jones case and is not in conflict with any decision of the United States Circuit Courts of Appeals, or any decision of this Court or any State Courts.

ARGUMENT

POINT 1

THE RULING OF THE CIRCUIT COURT OF APPEALS THAT THE RESPONDENT WAS NOT NEGLIGENT IS CORRECT

Solely issues of fact were involved in the question of respondent's liability for damages under the Jones Act. **The District Court did not hold that the officers of respondent's vessel knew that the assailant and his friends were drinking in one of the rooms aboard the ship;** what the District Court held, however, was that the ship's officers "knew or should have known" that the men were drinking aboard the vessel and should have anticipated that such conduct might lead to someone sustaining injury. But that holding by the District Court was not supported by the evidence, and the Circuit Court of Appeals so held (R. p. 510).

The record does not contain a scintilla of evidence that establishes or indicates the officers knew the men were drinking aboard the ship (R. pp. 277, 336, 357, 362) but, to the contrary, the record definitely shows that they had

no reason to be aware of the fact since: (1) the drinking participants were not loud or boisterous, and (2) the assailant and his companions at no time evidenced any violent mood and at no time indicated any intent to do harm or injury to anyone. The petitioner himself (who was the only factual witness who testified for the plaintiff at the trial) stated that the men were not creating a disturbance when he said that one would have to pass in the immediate vicinity of the forecastle involved to hear the men talking. See R. p. 82 where the plaintiff answered the following question:

> "Q. Can you tell us whether or not the voices and noise carried through the vessel? (Referring to the men who were drinking aboard the ship)
>
> "A. I wouldn't say carried through the vessel, as we have a pretty big place there, and the cargo winches going on outside, and couldn't tell. If you were on the opposite side of the messhall, you couldn't tell whether it was cargo winches or the noise of the ship, or the natives ashore on the dock, or what it was."

In addition to the above, the record is completely barren of evidence to suggest, let alone to establish, that the drinking participants had been guilty of misconduct aboard the vessel prior to the night in question; and not a scintilla of evidence is available to establish or indicate that the officers of the ship knew or should have known that the assailant would injure a fellow crewman. (R. pp. 277, 335, 336, 357, 362, 363).

In view of the above facts, the authorities cited by petitioner do not in the least support his position. In *Koehler vs. Presque-Isle Transportation Co.*, 141 F. (2d) 490, 1944 A.M.C. 432 (C. C. A. 2) there was evidence: (1) of prior misconduct by the assailant which was known to the vessel's officers (the second officer saw the assailant "pick" a fight and "beat up" a fellow seaman); (2) that the third officer saw the assailant "yelling and swearing" at the plaintiff; (3) that the plaintiff told the second officer, prior to the assault giving rise to the action, that the assailant had attacked him; and (4) that the officers knew the assailant was "waiting" for the plaintiff to attack him. There is no such evidence at all in the present case.

In the case of *Jensen vs. United States*, 184 F. (2d) 72, 1950 A.M.C. 1797 (C. C. A. 3) the evidence established: (1) that one of the ship's officers told the assailant to hold off fighting a crew member until both men returned to the ship; (2) that it was the custom on the vessel to permit crew members to fight, using a hatch cover as a ring; (3) that the custom was observed in the involved incident, the ship's officers acting as anxious boxing fans with the vessel's floodlights illuminating the improvised ring (hatch cover). The plaintiff was injured as he attempted to prevent the assailant from using a knife on his boxing opponent. Again, there is no such evidence at all in the instant case.

Certainly these two decisions are far afield from the factual aspects of the instant case. When men are repeatedly violent and belligerent (as in the *Koehler* case, supra), or make extensive preparations for a fistic encounter (as in the *Jensen* case, supra), one may conclude that their acts may "reasonably be expected to result in injuries to others".

But, in the instant case, where the assailant and others had been merely involved in a friendly gathering and drinking, unaccompanied by violence or boisterousness, they were not performing acts which may "reasonably be expected to result in personal injuries", as the Court of Appeals correctly held.

Petitioner's statement that "the theory of negligence alleged . . . to impose liability has not heretofore been considered by this Honorable Court in a case involving the Jones Act," is merely an attempt by petitioner to obtain review of the case by an asserted but unfounded claim of novelty. Actually, however, as in most cases under the Jones Act, the exclusive question before the Court of Appeals was a question of fact, the question of whether the alleged negligence existed and, if so, whether it was the proximate cause of the accident. See 46 USCA 688; *Pittsburgh vs. Palo*, 64 F. (2d) 198 (C. C. A. (6th) 1933); *Jackson vs. Pittsburgh S. S. Co.*, 131 F. (2d) 668 (C. C. A. (6th) 1942); *Naylor vs. Isthmian S. S. Co.*, 187 F. (2d) 538 (C. C. A. (2d) 1951); *Reynolds vs. Atlantic Coast Line R. Co.*, 196 F. (2d) 643 (C. C. A. (5th) 1952). Since the alleged assailant had no control or authority over petitioner; since the alleged assault was unconnected with the assailant's duties aboard the vessel; since the assailant was never guilty of misconduct prior to the involved assault; and since the vessel's officers not only did not know, but could not be fairly said to have had any reason to know, that the men were drinking aboard the ship or that anyone would attack and injure a fellow crewman, the Court of Appeals properly concluded that the District Court's decision was unsupported by the record and held that the respondent was not in fact negligent.

POINT 2

THE RULING OF THE COURT OF APPEALS THAT THE VESSEL WAS NOT UNSEAWORTHY IS CORRECT

The District Court held that the respondent's vessel was unseaworthy because the assailant was not "during the voyage in question, equal in disposition to the ordinary men of the calling". That holding was predicated upon the case of *Keen vs. Overseas Tankship Corp.*, 1952 A.M.C. 241, 194 F. (2d) 515 (C. C. A. 2) which held that the ship's warranty of seaworthiness includes a warranty to individual seamen that the other seamen are equal in disposition and seamanship to the ordinary men of the calling. That decision, however, is out of harmony with the long and well established jurisprudence on the subject, which holds that the vessel's warranty of seaworthiness, applied to assaults committed by unlicensed crew members, means that the shipowner is liable only if the assailant possessed vicious proclivities based upon a number of assaults, vicious in nature, and occurring so that the ship's officers knew or should have known the assailant's disposition. See *E. W. Ward, Jr.*, 20 F. 702 (1884); *Hurley v. The Lizzie Frank*, 31 F. 477 (D. C. Ala. 1887); *The Rolph*, 299 F. 52, 1924 A.M.C. 942 (C. C. A. 9); *Yukes v. Globe Steamship Corporation*, 107 F. (2d) 888 (C. C. A. (6th) 1939); *Lykes Bros. Steamship Co., Inc. v. Grubaugh*, 1942 A.M.C. 1305, 128 F. (2d) 387 (C. C. A. 5); *Kyriakos v. Goulandris*, 151 F. (2d) 132, 1945 A.M.C. 1041 (C. C. A. 2); *Brailas v. Shephard Steamship Co.*, 1946 A.M. C. 51, 152 F. (2d) 849 (C. C. A. (2d) 1945); *Kable v. United States*, 1948 A.M.C. 1595, 169 F. (2d) 90 (C. C. A. 2); *Hughes on Admiralty*, 2nd Ed. (1920 p. 205, 206; *The Law of Seamen, Norris*, Volume 2 1952 p. 374).

It is therefore submitted that the Court of Appeals was correct in rejecting the principle of the Second Circuit Keen decision.

However, even within the principle of the Keen decision, the instant case is not one of liability, and the Court of Appeals specifically so held.

The District Court's decision in the instant case was rendered on May 14, 1953; however, on June 4, 1953 the Court of Appeals for the Second Circuit (the same Court which had decided the *Keen* case) rendered judgment in the case of *Jones v. Lykes Bros. Steamship Co., Inc.*, 204 F. (2d) 815. It decided therein the issue of unseaworthiness in a seaman's assault case in favor of the shipowner, all in spite of the brutal nature of the assault and the extensive injuries received by the plaintiff. **It there followed the well established standards of liability which existed in such matters since the case of The Rolph,** 299 Fed. 52, 1924 A.M.C. 942 (C. C. A. 9), **and from which the courts had not departed prior to the Keen decision.** In effect, therefore, the Second Circuit has now repudiated its earlier holding (in *Keen*) that a shipowner warrants to each seaman that the other seamen aboard its vessel are of equal temperament and disposition, and has now recognized (in *Jones*) that in the ultimate analysis each case must be decided on its own particular facts.

Petitioner, in its brief, has made no effort to discuss or to analyze the Jones decision; indeed, petitioner has ignored the case as though it did not exist; all in spite of the fact that the Fifth Circuit herein fully discussed that case

and held, in effect, that the facts of the instant case do not fall within the scope of the Keen case, but fall within the scope of the Second Circuit's later holding in the Jones case. The Circuit Court stated:

> " . . . We, therefore, decline to accept the so-called standard laid down in the Keen case *or to approve the action of the Court below in attempting to apply it here.*
>
> **"We might say in passing, though, that since the assailant in this case did not use a meat cleaver but a bottle, and since he did not, as the assailant did in Jones vs. Lykes, commit mayhem on the plaintiff while he was down and out, we do not believe that the District Judge would have thought this was a case for the application in favor of the victim of the equal disposition standard if he had known that its creators would refuse to apply it in favor of the victim in the Jones case."**

This makes it plain that while the Fifth Circuit does not approve the *Keen* decision, it has not decided the present case on that basis. It has decided the present case, on its facts, consonantly with the *Jones* decision — and thus there is actually no genuine divergence between Circuits under the particular facts of this case. The claim that there is such a divergence is illusory and untenable.

The conclusion of the Circuit Court that the instant case on its facts falls within the *Jones* decision where the ship was held not to be unseaworthy, and not within the *Keen*

decision where the contrary conclusion was reached, was predicated upon the following affirmatively established and virtually undisputed facts about the assailant:

(1) Excluding the instant case, he was never guilty of any assault aboard the MASON LYKES or any other vessel; and he had been on the MASON LYKES for several months before the involved incident (R. pp. 277, 325, 362, 363 and 390).

(2) He has never been charged or investigated by the United States Coast Guard for misconduct, assaults, or fights (R. 390).

(3) He was and has been in good standing with the United States Coast Guard since he entered the marine service in 1946 (R. 233, 390).

(4) He has been and is in good standing with his union, the National Maritime Union (R. 233), as distinguished from petitioner who has been expelled from said union (R. pp. 110-111).

(5) He has been going to sea since the involved incident without a blemish on his maritime record and service.

CONCLUSION

It is therefore respectfully submitted that the decision in the instant case is in accordance with the prevailing law

on the subject and that there is no sound basis for the granting of the petition for certiorari, and thus the request for certiorari should be denied.

Respectfully submitted,

JOSEPH M. RAULT
Counsel for Respondent
825 Whitney Bank Bldg.
New Orleans, Louisiana

TERRIBERRY, YOUNG, RAULT & CARROLL
ANDREW R. MARTINEZ
WILLIAM E. WRIGHT
Of Counsel.

CERTIFICATE

I certify that I have served copies of the foregoing brief on counsel for all parties of record by mailing them to their respective offices this ____ day of _____, 1954.

_____
Joseph M. Rault

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FEB 5 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 406

ELIE J. BOUDOIN
Petitioner

versus

LYKES BROS. STEAMSHIP CO., INC.,
Respondent

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF ON THE MERITS

JOS. M. RAULT
ANDREW R. MARTINEZ
WILLIAM E. WRIGHT
825 Whitney Bank Bldg.,
New Orleans 12, Louisiana.
Attorneys for Respondent

TERRIBERRY, YOUNG, RAULT & CARROLL
Of Counsel

TABLE OF CONTENTS

Page

Index of Authorities:

Statutes ii
Publications ii
Commentaries ii
Cases iii

Statement of the Case 1

Summary of Argument:
1 - Alleged Unseaworthiness 6
2 - Alleged Negligence 7

Argument:
Point I: The S. S. Mason Lykes Was Not Unseaworthy 8
(A) *Keen* is Unsound in Law 8
(B) *Keen* Affords No Workable Standard of Testing Liability 12
(C) *Keen* is Unjustified and Undesirable 15

Point II: The Present Test of Prior Misconduct of the Offending Seaman Is Sound in Law 20

Point III: The Presence of the Offending Seaman, Gonzales, Aboard the SS Mason Lykes Did Not Render Her Unseaworthy 22

Point IV: The SS Mason Lykes Was Not Negligent 25
(A) The Facts 25
(B) The Law 30

Conclusion 36

INDEX OF AUTHORITIES

Statutes

Public Law 664, 83rd Congress, 2nd Session

United States Code, Annotated
Title 46, Section 688

Publications

Industrial Relations in Ocean Shipping Industry, Report of Industrial Relations Counselors, Inc., to Maritime Industry Survey Committee (1953)

Ocean Transportation, Carl E. McDowell and Helen M. Gibbs (New York 1954)

Study by Industrial Relations Counselors, Inc. (1953)

Commentaries

Hughes on Admiralty, 2nd Edition (1920) p. 205-206

Norris, The Law of Seamen, Vol. 2 (1950) Section 687, p. 374

Robinson on Admiralty

28 St. John's L. Rev., p. 87-93 (1953)

5 Stan. L. Rev., p. 814 (1952-1953)

26 Sou. Calif. L. Rev., p. 341 (1953)

30Tex. L. Rev., 492-497 (1952)

29 Tulane L. Rev., p. 141 (1954)

Cases

Page

Adamowski v. Gulf Steel Corp., 197 F. (2d) 523 (C. C. A. 3d 1952) cert. den. 96 L. Ed. 1324 21

Balado v. Lykes Bros. S. S. Co., Inc., 179 F. (2d) 943 (C. C. A. 2d 1950) 21

Bonsalem v. Byron S. S. Co., Ltd., 50 F. (2d) 114 (C. C. A. 2d 1931) 10

Brady v. Southern Railway Company, 320 U. S. 476, 483, 64 S. Ct. 232, 88 L. Ed. 239 31

Buralis v. United States, 79 F. Supp. 963 (D. C. N. Y. 1948) 35

Cain v. Alpha S. S. Co., 281 U. S. 642, 1930 A. M. C. 1133 35

Carter Oil Co. v. McQuigg, 112 F. (2d) 275, (C. C. A. 7th 1940) 33

Chapman, et ux v. United States, 194 F. (2d) 974 (C. C. A. 5th 1952) 23

Cookingham v. United States, 184 F. (2d) 213 (C. C. A. 3d 1950), cert. den. 340 U. S. 935, 71 S. Ct. 475 21

Daniels v. Pacific Atlantic S. S. Co., 120 F. Supp. 96 (Dist. Ct. N. Y. 1954) 21

David Pratt, The, Fed. Cas. 3597 (Dist. Ct. Me. 1839) 19

Davis v. Green, 260 U. S. 349, 43 S. Ct. 123, 67 L. Ed. 299 (1922) 35

Page

Fleming v. Palmer, 123 F. (2d) 749 (C. C. A. 1st 1941), cert. den. 316 U. S. 662, 62 S. Ct. 942, 86 L. Ed. 1739 (1942) 33

Fontmorin, Rose v. United States Lines Co., Civil Action, U. S. D. C., S. D. N. Y. 16

Garrison v. United States, 121 F. Supp. 617 (D. C. Col. 1954) 21

Hardon v. Gordon, Fed. Cas. 6047 (C. C. Me. 1823) 19

Hume v. Moore-McCormack Lines, 121 F. (2d) 336 (C. C. A. 2d 1941) 19

Jamison vs. Encarnacion, 281 U. S. 635, 1930 A. M. C. 1129 35

Jensen v United States, 184 F. (2d) 72, 1950 A. M. C. 1797 (C. C. A. 3d) 31

Jones v. Lykes Bros. S. S. Co., Inc., 1953 A.M.C. 1010, 204 F. (2d) 815 (C. C. A. 2nd) 12, 21

Jones v. Lykes Bros. S. S. Co., Inc., 1953 A.M.C. 703 (Dist. Ct., S. D. N.Y.), rev. on appeal 15

Kable v. United States, 1948 A.M.C. 1595, 160 F. (2d) 90 (C. C. A. 2d) 9

Keen v. Overseas Tankship Corp., 1952 A.M.C. 241, 194 F. (2d) 515 (C. C. A. 2nd) 8, 12

Kelcey v. Tankers Co., Inc., Civil Action, Dist. Ct., S. D. N.Y., No. 60-122 (unpublished) 13

Koehler v. Presque-Isle Transportation Co., 141 F. (2d) 490, 1944 A.M.C. 432 (C. C. A. 2nd) 31

Kyriakos v. Goulandris, 151 F. (2d) 132, 1945 A.M.C. 1041 (C. C. A. 2d) 9

Page

Larsen v. Lindvig, et al, 292 Fed. 640 (D. Ct., Calif., 1923) 10
Lewark, Jos. H. v. Marine Transport Lines, Inc., Civil Action No. 42-103, Dist. Ct. S. D. N.Y. 16
Lykes Bros. Steamship Co., Inc. v. Grabaugh, 1942 A. M. C. 1305, 128 F. (2d) 387 9
McAllister v. United States, 99 L. Ed. 13 (1954) 33
Naylor v. Isthmian S. S. Co., 187 F. (2d) 538 (C. C. A. 2d 1951) 23
Nowery v. Smith, et al, 69 F. Supp. 755 (D. C. Penn. 1946) 35
Osceola, The, 189 U. S. 158, 23 S. Ct. 483, 47 L. Ed. 76 (1903) 15
Pacific Portland Cement Co. v. Food Mach. and Chem. Corp., 178 F. (2d) 541 (C. C. A. 9th 1949) 33
Palmer v. Hoffman, 318 U. S. 109, 65 S. Ct. 477, 87 L. Ed. 645 (1943) 23
Pittsburgh v. Palo, 64 F. (2d) 198 (C. C. A. (6th) 1933) 31
Reynolds v. Atlantic Coast Line R. Co., 196 F. (2d) 643 (C. C. A. (5th) 1952) 31
Rolph, The, 299 Fed. 52, 1924 A. M. C. 942 (C. C. A. 9th) 9
Rouchleau v. Silva, 1950 A. M. C. 673 34
Stankiewicz v. United Fruit S. S. Corp., et al, 123 F. Supp. 714 (D. C. N.Y. 1954) 32
Steely v. Kern, 313 U. S. 545 (1941) 35
Vojkovich v. Ursich, 121 P. (2d) 803, 49 Cal. App. (2d) 268 (1942) 34
Yukes v. Globe Steamship Corp., 107 F. (2d) 888 (C. C. A. 6th 1939) 10

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1954

NO. 406

ELIE J. BOUDOIN,
Petitioner

versus

LYKES BROS. STEAMSHIP CO., INC.,
Respondent

RESPONDENT'S BRIEF ON THE MERITS

MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE

This case concerns the effort to recover damages from the employer for an assault committed by one unlicensed seaman on another. It arises out of a purely personal, private encounter, having no connection whatever with the ship's

business, occurring in the crew's quarters of the vessel at 2 o'clock of the morning after a holiday.[1] Liability was sought to be predicated upon two theories: (a) the allegedly unseaworthy condition of the ship under the doctrine of *Keen v. Overseas Tankship Corporation*, on the hypothesis that the offending seaman was not "equal in disposition and seamanship to the ordinary men in the calling"; (b) the alleged negligence of respondent in that the assailant, with other members of the crew, had been drinking aboard the vessel shortly prior to the incident, and that the officers of the ship should have discovered the drinking and then suppressed it.

The two men involved were both unlicensed members of the crew.[2] Neither had any supervisory control whatsoever over the other; in fact, they were each in different departments of the vessel.[3] The incident was wholly unconnected with the business of the vessel and was in every sense purely personal and private.

The case arose under the following circumstances:

On Thanksgiving Day, 1949, the SS MASON LYKES, owned by respondent, was docked in Walvis Bay, Africa.[4] Petitioner, Boudoin, who had been off duty for the holiday and who had been ashore drinking, returned to the ship at about 5 p.m., and went to his room and to bed.[5] He brought with him from shore several bottles of liquor which he hid

---

[1]R. 270.
[2]R. 269-270.
[3]Ibid.
[4]R. 78
[5]R. 94.

under his bunk.[6] At about midnight, three other unlicensed members of the crew, including one Gonzales, who also had been ashore, returned to the vessel and went to the room of one of them,[7] in close proximity to that of Boudoin.[8] The three of them spent something less than the next two hours talking and drinking.[9] At 1:30 a.m., Boudoin got up for a sandwich, looked in on the three, declined their invitation to join them, returned to his nearby-room and went back to bed.[10] He left his door standing open,[11] and soon fell asleep or almost asleep.[12]

The record is devoid of evidence that the three drinking companions were at any time causing a disturbance. There is no evidence that the night mate knew of the drinking, or that the three could be heard away from the room.[13] Boudoin did not complain of any noise or disturbance, and their talking was not sufficient to keep him awake.[14]

At about 2 a.m., Gonzales left his companions and went to Boudoin's room, the door of which, as has been said, was standing open.[15] There he attempted to take one of Boudoin's bottles of liquor.[16] Boudoin, becoming aware of Gonzales's presence in the room, grabbed him,[16A] and in the

---

[6]R. 91-92.
[7]R. 429-430.
[8]R. 83.
[9]R. 270, 333, 429; petitioner's appellate brief p. 1 recited that the men arrived aboard "about midnight" and that the incident took place "about 2:00 a.m."
[10]R. 78-83.
[11]R. 83.
[12]Ibid.
[13]R. 78-83, 279-280, 335, 344.
[14]Ibid.
[15]*Supra*, Note 11.
[16]R. 84.
[16A]R. 113.

effort to escape, Gonzales struck Boudoin on the head with the bottle.[17] As a result of the blow, Boudoin received injuries for which the District Court awarded him $2,100.00 in damages on the basis both of unseaworthiness and of negligence.[18] He was also awarded his maintenance, which respondent has paid in full.[19]

The brief filed by Boudoin in this court is at great pains, in a highly colored and exaggerated vein, to paint Gonzales as a person of violent and turbulent disposition. The true fact, however, is that except for this single incident Gonzales has a good record. Since 1939 he has held certificates of the United States Coast Guard as a competent seaman.[20] He has been and still is in good standing as an active member of the National Maritime Union.[21] Except for this one incident, he has never been involved in any similar misconduct during all his long service at sea.[22] At no other time has he ever assaulted a fellow crew member, ashore or afloat.[23] He remains in good standing with the Coast Guard, and except for this one instance, has never been logged or found guilty of any misconduct.[24]

Under these circumstances, the Court of Appeals for the Fifth Circuit reversed the District Court on both counts.[25] On the hypothetical unseaworthiness, the Court of Appeals held that the record does not furnish support for the con-

---

17R. 84.
18R. 487.
19R. 498-499, 503.
20R. 389.
21R. 233, 400.
22R. 114, 277, 335-336, 357, 390.
23R. 390, 391.
24Ibid.
25R. 502-511.

clusion that Gonzales was a person of violent and belligerent disposition.[26] It also rejected the *Keen* case as a plain and unjustified departure from the long settled law governing responsibility for injuries intentionally inflicted by one seaman on another, and as setting up a standard of seaworthiness which is lacking in definiteness and objectivity.[27] On the second count, that of the alleged negligence, the Court of Appeals found — as it could not possibly otherwise have found on this record — that there is absolutely no substantial evidence upon which to rest a finding that the shipowner was negligent.[28]

Thus, the sole questions here presented are these:

a) Is a shipowner to be held liable in damages on the ground of supposed unseaworthiness in the case of a personal and private encounter between unlicensed seamen, wholly unconnected with the ship's business, occurring during off-hours, and where, except for this one incident, the offending seaman has an otherwise good record?

b) Is a shipowner to be held liable in damages on the ground of negligence under the *Jones Act*, where neither seaman in the encounter has any authority over the other, and where there is no evidence that the officers of the ship knew or should have known that anyone

---

[26] Ibid.
[27] 507.
[28] 510.

on board was drinking or that anyone was likely to be injured as a result?

* * * * * *

SUMMARY OF ARGUMENT

1. *ALLEGED UNSEAWORTHINESS*

It is respondent's position that the Steamship MASON LYKES was not rendered unseaworthy by reason of Gonzales's presence aboard her as a member of her crew. The Court of Appeals correctly concluded that the shipowner's warranty of seaworthiness, as applied to fights and assaults committed on each other by unlicensed crew members, and growing out of purely personal, private affrays, is to be determined by ascertaining whether or not the offending party possessed vicious proclivities which were known or should have been known by the ship's officers. Measured by this standard of liability, it is conceded by petitioner, or virtually so, that the vessel was not unseaworthy.

It is also respondent's position that the so-called "equal disposition" test of unseaworthiness announced by *Keen* v. *Overseas Tankship Corporation* should be rejected as being unsound in law, unworkable in practice and unjustified under modern conditions of ship operation. Alternatively, however, respondent submits that the mere presence of Gonzales in the crew, even under the so-called "equal disposition" test of *Keen*, did not render the MASON LYKES unseaworthy.

2. *ALLEGED NEGLIGENCE*

The District Court's finding that the respondent was liable on the ground of negligence under the *Jones Act*, in that the officers of the ship "knew or should have known" that Gonzales and his two friends were drinking, and, because of that drinking, that the officers "knew or should have known" that someone might sustain personal injury, is not supported by any substantial evidence. The evidence in this record, insofar as it relates to the incidents on shipboard, is, except for the testimony of Boudoin, based on depositions, and was properly held by the Court of Appeals not to sustain the judgment. The record will show that respondent was in fact not negligent because:

1. The officers of the ship did not in fact know and had no reason to know that any drinking was in progress;

2. The officers of the ship did not know and in fact had no reason to know that personal injury to any member of the crew might result from the drinking;

3. In any event, petitioner's injuries were not a foreseeable consequence of the drinking;

4. A shipowner is not liable for an assault wholly unconnected with the ship's business, resulting from a purely private, personal encounter, and committed by one unlicensed crew member on another.

Accordingly, the decision of the Court of Appeals was correct and should be affirmed.

ARGUMENT

POINT I

THE S. S. MASON LYKES WAS NOT UNSEAWORTHY

THE TEST OF LIABILITY ANNOUNCED BY KEEN V. OVERSEAS TANKSHIP CORPORATION IS UNSOUND IN LAW, UNWORKABLE IN PRACTICE, AND UNJUSTIFIED.

A judicial decision cannot have aroused so many adverse critics as has *Keen v. Overseas Tankship Corporation*[29] without there being genuine justification for their criticism.[30] It flows from *Keen's* unsoundness in law, its unworkability in practice and its lack of justification under present day conditions. This can amply be demonstrated:

(a) *KEEN IS UNSOUND IN LAW*

By long and well established jurisprudence, a vessel's warranty of seaworthiness, applied to assaults committed by unlicensed crew members on each other, makes the shipowner liable only if the assailant actually possessed such vicious proclivities, based upon a prior bad record of bru-

---

[29] 194 F. (2d) 515 (C. C. A. 2d 1952).

[30] 28 *St. Johns' L. Rev.* p. 87, 93 (1953); *26 Sou. Calif. L. Rev.* p. 341 (1953); 29 *Tulane L. Rev.* p. 141 (1954); see also, 30 *Texas L. Rev.* 492-501; 39 *Cornell L. Quar.* p. 381 (1954); 5 *Stan. L. Rev.* p. 814 (1952-1953).

tality, that the ship's officers knew or should have known of his dangerous disposition. In fact, prior to *Keen*, no court had gone to the length of holding a shipowner liable in an assault case involving a purely personal, private quarrel of unlicensed crew members, where the assailant did not in fact possess known vicious traits.

A brief review of the jurisprudence prior to *Keen* will be illuminating.

In *The Rolph*[31] it was held that the vessel was unseaworthy where the chief mate was a man known to be of a most brutal and inhuman nature, and to give vent to a wicked disposition by violent, cruel and uncalled for assaults upon sailors.

In *Kyriakos v. Goulandris*,[32] the assailant, prior to the attack in question, had shown himself to be of "savage and uncontrolled disposition" and there was evidence that the master of the ship was fully informed that he was a "quarrelsome trouble-maker", a smoker of hasheesh, that he had assaulted more than one man at least once with little or no reason, and that members of the crew had already complained of him to the master.

In *Lykes v. Grabaugh*,[33] the shipowner was not liable for what was "merely a wanton and wilful act done to satisfy the temper or spite of the employee."

In *Kable v. United States*,[34] there was a prolonged con-

---

31 299 F. 52, 1924, AMC 942 (C. C. A. 9th).
32 151 F. (2d) 132, 1945 AMC 1041 (C.C.A. 2d).
33 128 F. (2d) 387, 1942 AMC 1305 (C. C. A. 5th)
34 160 F. (2d) 90, 1948 AMC 1595 (C. C. A. 2d).

troversy and several assaults in a purely personal matter, and the shipowner was not liable.

In *Yukes v. Globe Steamship Corp.*,[35] the injuries were sustained in an altercation and a scuffle constituting a mere private brawl, and there was no liability.

In *Larsen v. Lindvig et al*,[36] the shipowner was liable for an assault because it was committed under the express instructions of the vessel's master, the court relying upon *The Rolph* decision.

In the case of *Bonsalem v. Byron S. S. Co., Ltd.*[37] the shipowner was exonerated for an unprovoked assault committed by the chief steward, the court holding, under the authority of *Davis v. Green*, that the shipowner is not liable for injuries for an assault "not committed by any officer of the vessel in furtherance of the appellant's [shipowner's] business."

Based on these and other decisions the law is stated in Hughes on Admiralty:[38]

> "Intentional injuries. The better opinion is that one of the contractual duties both of the owner and master is a general duty of protecting the seaman from cruelty or ill usage. This necessarily includes liability for the personal act of the master, or the mate while acting as master. But it should

---

35 107 F. (2d) 888 (C. C. A. 6th 1939).
36 292 Fed. 640 (D. Ct. Calif. 1923).
37 50 F. (2d) 114 (C. C. A. 2d 1931).
38 2nd Ed., (1920) p. 205-206.

> not impose any liability for a single act of violence by an officer out of the line of his duty, or by another seaman at all."

Finally, the latest textbook on the law of seamen, *Norris*[39] states:

> "If the assault involved constitutes a private brawl arising out of personal differences between the assailant and the victim, or between the fighters, with the assaulter not being the superior officer of the assaulted, liability will not be that of the shipowner."

Keen v. Overseas Tankship Corporation, however, disregarding these well established principles, introduced a wholly new test of seaworthiness, a test which makes the shipowner the guarantor that seamen are "equal in disposition and seamanship to the ordinary men in the calling." This standard was undoubtedly a departure from the long, well recognized and well established jurisprudence; the Court of Appeals so held in the instant case;[40] and *Keen* itself indeed admitted as much.

Petitioner concedes, or virtually so, that by the law in the absence of *Keen*, this case is not one of liability.

The question, therefore, is whether the *Keen* departure is sound in principle, and whether, under modern conditions, it is justified.

---

[39]The Law of Seamen, Vol. 2 (1950), Sec. 687, p. 374.
[40]*Supra*, Note 25.

(b) *KEEN AFFORDS NO WORKABLE STANDARD OF TESTING LIABILITY*

The unworkability of the test set up by *Keen* emanates from the fact that it affronts a basic and fundamental law of human nature: that all men, especially seamen, who are drawn from all walks of life and from the various corners of the earth, and who are much "more apt to use their fists than office employees",[41] are vastly different from each other, and there is no standard except that of performance from prior misconduct, by which one can, with any degree of intelligibility, or even approximation, measure their disposition. To make the innocent shipowner the absolute guarantor of the "equal disposition" of seamen, is to make him guarantor of the equality of things which are notoriously and inherently unequal. Carried to its logically inescapable conclusion, *Keen* will make the shipowner the absolute guarantor that an individual seaman will not lose his temper in some — to him — provocative situation growing out of a personal quarrel. As the court below said, such a test is not an objective test, but is one founded only on reasoning "personal to the reasoner".[42]

The unworkability of the test set up in *Keen* is also made manifest by the decision of its own authors in the subsequent *Jones* case.[43]

In *Jones,* the authors of *Keen* appear definitely to have shrunk back from their own extreme doctrine. Oddly en-

---

[41]*Jones v. Lykes Bros. S. S. Co., Inc.*, 204 F. (2d) 815, 1953 AMC 1010, 1012, (C. C. A. 2d).
[42]R. 509.
[43]*Supra,* Note 41.

ough, petitioner's brief in this court somehow gets the two cases hopelessly mixed up and exactly reversed. In *Jones*, the assault was violent, unprovoked and premeditated.[44] In *Keen*, the assault was violent, provoked, and unpremeditated.[45] The *Keen* assailant is held to be "unequal", and there is liability; the *Jones* assailant is held to be "equal" and there is no liability. Careful study of the cases will fail to show any comprehensible basis for learning why the ship in *Keen* was unseaworthy, while that in *Jones* was seaworthy. *Kelcey*,[46] which is claimed by petitioner to clarify the confusion,[47] actually does nothing of the sort.

Petitioner examines these cases and emerges with the theory that a primary question in determining seaworthiness is whether the assault was provoked;[48] that if the assault was provoked there should be no liability; but if it was unprovoked there should be liability. If anything is plain in the confusion arising from *Keen* and *Jones*, it is that provocation is not an element at all. In *Keen*, the injured party provoked the assault and recovered damages; in *Jones*, the injured party did not provoke the assault, and did not recover; and in *Kelcey*, the injured party did not provoke the attack, and did recover. Thus, there is every possible involvement of provocation and no provocation, with no consistency of result.

---

[44]The court found: " . . . After the plaintiff had completed his work and returned to his quarters he was suddenly and *without provocation* beaten . . . " (emphasis ours).

[45]The court found: " . . . Keen knocked down Mruczinski with his fist . . . "

[46]*Kelcey v. Tankers Co., Inc.*, Civ. Act., Dist. Ct. Sou. Dist. N. Y., No. 60 — 122 (unpublished).

[47]petitioner's brief p. 24.

[48]Ibid.

Parenthetically, and so that *Kelcey* can be kept in its proper focus, it should be observed that the real basis of that decision was that the assailant had a bad prior record of actual conviction of assault with a dangerous weapon, and that two days before the attack the offender had actually chased Kelcey out of the galley with a knife.[49] Thus *Kelcey* was a plain case of liability under the doctrine of known or knowable misconduct. It did not need *Keen* to support it, and it does nothing whatsoever to resolve the *Keen - Jones* confusion. This very confusion vividly points up and illustrates the conjectural and speculative basis of attempting to determine the seaworthiness of a ship by the test announced in *Keen.*

* * * * * *

The suggestion is advanced that the standard of *Keen* is analogous to the general tort standard of the "average reasonable man."[50] That suggestion overlooks the fact that what we are seeking here is some reliable, predictable basis for determining whether or not a ship possesses the characteristic of seaworthiness. Seaworthiness in hull and gear can be determined with a real degree of accuracy by objective, practical and scientific tests. There is every reason why the same objectivity should be desirable as to personnel. "Seaworthiness" of personnel, however, can only be determined by prior conduct, and "unseaworthiness" can only be deduced from prior misconduct. When the standard is reduced, as it is reduced by *Keen,* to the vague, subjective

---

[49] *Supra*, Note 46.
[50] petitioner's brief p. 17-18.

test of "equal disposition", the parties and the courts[51] are at a complete loss to ascertain whether a particular seaman meets that test, and no test yet devised — except that of prior conduct — could possibly forecast whether a seaman possesses the required "equal disposition", or how he might react in a private, personal altercation with a fellow seaman.

In the light of these considerations, it seems entirely plain that the *Keen* test, a purely subjective test, furnishes absolutely no reliable, consistent or workable standard for determining whether the presence of any particular seaman on board a ship renders her unseaworthy. A test so utterly lacking in definiteness, precision and objectivity is unjust, improper and unsound in law.

(c) *KEEN IS UNJUSTIFIED AND UNDESIRABLE*

In considering whether there is any need to give to the seaman a wholly new ground of recovering damages on the basis of the liability of a shipowner without fault for injuries resulting from personal affrays, it seems desirable first to assess the already ample fields of recovery which the seaman presently enjoys. They are:

1. The injured seaman has the right to be maintained and cured at the expense of his ship, regardless of fault.[52] More frequently than

---

[51] R. 508; *Jones v. Lykes Bros. S. S. Co., Inc.*, 1953 AMC 703 (Dist. Ct. Sou. Dist. N. Y.); rev. on appeal, *supra* note 41.

[52] *The Osceola*, 189 U. S. 158, 23 S. Ct. 483, 47 L. Ed. 760 (1903); Robinson on Admiralty (1930) p. 291.

not, this important right alone exceeds by far the maximum monetary recovery allowed shoreside workers under Workmen's Compensation Statutes;[53] e.g., in *Jones vs. Lykes Bros. S. S. Co., Inc.*,[54] in which recovery for damages was denied, the seaman actually recovered, in maintenance, over $11,500.00.[55] The daily maintenance rate under present union contracts is $8.00 per day, or $240.00 a month.[56]

2. The injured seaman, regardless of fault, recovers wages to the end of the voyage.[57]

3. In addition to maintenance, cure and wages, and independently thereof, the seaman injured by the unseaworthiness of his ship (i.e., in the case of assault, by an assailant of brutal characteristics which are known or knowable) is entitled to compensatory damages.[58]

---

[53]Vol. 30 *Tex. L. Rev.* 492 (1952): "The seaman, . . . is not forced to choose between compensation and indemnity . . . Statute and tradition combine to provide explicitly a double remedy. His right to maintenance and cure plus full wages is analagous to compensation, *although much more liberal*, while the right to indemnity is not alternative, but in addition to maintenance and cure . . . The cost of such a double recovery is a heavy burden for the Defendants to bear . . . " (emphasis ours).

[54]*Supra*, Note 41.

[55]Ibid; See also District Court Record, Civ. Action 60-122, Sou. Dist. N. Y.; *Joseph H. Lewark v. Marine Transport Lines, Inc.*, Civ. Action No. 42-103 (U. S. District Ct. Sou. Dist. N. Y.) ($10,000.00 awarded in maintenance); *Rose Fontmorin v. U. S. Lines Co.*, Civ. Act., Sou. Dist. N. Y. ($10,000.00 maintenance judgment).

[56]Contracts between unions and companies; see also R. 498.

[57]*Supra*, Note 52.

[58]*Supra*, Notes 31-39.

4. Also, in addition to maintenance, cure and wages, the seaman injured by the negligence of the shipowner or of his fellow seaman is entitled, under the *Jones Act*,[59] to compensatory damages.

In no other industry is the worker so favored.[60] The addition to these rights by further projection and extension of the field of liability without fault, to include damages in the case of private, personal encounters between men who have given no prior indication of misconduct or of bad disposition, is unnecessary, and is uncalled for by any consideration of justice or humanity.[61]

It seems too plain to require elaboration that *Keen* invites a flood of litigation involving seamen's affrays. It invites every seaman who loses a fight, indeed, every seaman who suffers injury in any kind of personal altercation, ashore or afloat, to seek to charge the shipowner in damages because his opponent was "unequal in disposition" to the "average" seaman. There actually has already begun a spate of litigation involving brawls and fights, even those occurring in bar-rooms ashore, in which liability is being sought to be predicated upon *Keen*. *Keen* encourages such suits; and certainly, taken at its face value, there is nothing in *Keen* to inhibit them.

It is not argued that this one case, by itself, could radically change the industry. It is submitted, however, that the sharply increasing costs to which the shipowner is put

---

[59] 46 U.S.C.A. 688.
[60] *Supra*, Note 53.
[61] *Supra*, Note 30.

by these widening liabilities, to which *Keen* substantially adds, are properly becoming more and more a matter of concern to the American shipping industry. The steady extension of liability for incidents over which the shipowner, in the very nature of things, can have no possible control and can take no effective preventive measures, represents a definitely important element in the disadvantageous position in which American shipping is now being placed in its competition with foreign shipping.[62] It may very well have its proportionate weight in the decision of whether to transfer operations to foreign flags.[63] The extension of the shipowner's liability herein sought should not, in the absence of some genuinely controlling reason, be allowed to contribute to such a result; and no controlling reason suggests itself in this case.

These considerations seem also effectively to dispose of petitioner's resort to the well-worn suggestion that the lack of *stare decisis* should not hinder the "progress of the law",[64] and to his invoking of the doctrine of the "wardship" of the admiralty over seamen.[65] Certainly, the extension of the shipowner's liability in damages to the absolute warranty of the "equal disposition" of seamen, fomenting, as beyond doubt it has already fomented, litigation involving every type of seaman's personal altercation, cannot fairly or legitimately be labeled "progress".

---

[62] *Supra*, Note 56; *see also* The so-called "50-50 Law", Public Law 664, 83rd Cong., 2d Sess.; ibid; Industrial Relations in Ocean Shipping Industry, Report of Industrial Relations Counselors, Inc. to Maritime Industry Survey Committee (1953); Study by Industrial Relations Counselors, Inc. (1953).

[63] Ibid; Research report No. 54-17, American Merchant Marine Institute, Inc., Dec. 13, 1954.

[64] petitioner's brief p. 16.

[65] Ibid p. 19-20.

So, too, petitioner's reference to "wardship".[66] Seamen, injured in fights, brawls, or assaults, when not themselves guilty of gross misconduct, are entitled, under the benevolent doctrine of maintenance and cure, to receive, at the expense of the shipowner, full maintenance, along with cure (medical care) until they have reached fullest possible recovery.[67] There is no legitimate ground for using the "wardship" doctrine as an excuse for imposing upon the industry a wholly new area of liability in damages without fault. This seems particularly true when it is remembered that the low social and economic status of the seaman, which originally gave rise to the "wardship" idea,[68] no longer exists.[69] The advance in the seaman's social and economic status forms one of the most interesting success stories in modern labor - management relations. In 1939, the AB seaman's average earnings were only $82.00 a month; today they are over $525.00 a month, without regard to all the other and numerous "fringe" benefits attached to his contract.[70] Today, the seaman's effective measure of security is derived not only from the wide and benevolent protection which the law has thrown around him, but also from the strength of his union, in which he participates, which he helps to operate, and which has now assumed a good part of the day-to-day protective role which formerly only the courts could provide.[71]

---

[66] *Supra*, Note 65.
[67] *Supra*, Note 52.
[68] *Harden v. Gordon*, Fed. Cas. 6047 (C. C. Me. 1823); *The David Pratt*, Fed. Cas. 3597 (D. Ct. Me. 1839); *Hume v. Moore — Mc Cormack Lines*, 121 F. (2d) 336 (C. C. A. 2d 1941).
[69] *Supra*, Notes 53, 56, 62.
[70] See report and survey *supra*, Note 62.
[71] Ibid.

Accordingly, *Keen,* under present day conditions, is undesirable and unjustified, and the Court of Appeals rejection of it should be affirmed.

POINT II

THE PRESENT TEST OF PRIOR MISCONDUCT BY THE OFFENDING SEAMAN IS SOUND IN LAW.

While the warranty of seaworthiness, in nature and quality, is absolute, and is a species of liability without fault,[72] it has never been held to apply in cases of fight and private quarrels of unlicensed seamen to the same extent as in cases of defects in hull and gear.[73] There are compelling reasons for the distinction.

As the court well knows, in modern operations, the shipowner, is compelled to obtain all seagoing personnel through union halls.[74] The unions do not permit the rejection of their members in good standing unless the shipowner can make a clear showing that the rejected seaman has, by prior misconduct, demonstrated his incompetency or disqualification.[75] To hold that the shipowner guarantees what he cannot reject, is to force him to guarantee what he is forced to take, ignores the practical realities of life, and does not appeal to any sense of fundamental fairness or justice.

---

[72]petitioner's brief p. 14.
[73]*Supra*, Notes 31-39.
[74]Ocean Transportation, Carl E. Mc Dowell and Helen M. Gibbs (New York 1954) p. 211; supra Note 56.
[75]Ibid: R. 135-136.

Furthermore, while the warranty is a species of liability without fault,[76] it is certainly not a species of liability without defect. It is clear that, in order that liability attach for unseaworthiness, there must in fact exist a defect actually amounting to unseaworthiness, a genuine defect and not one merely temporary or transient.[77] Defects of such a kind exist in every example cited in petitioner's discussion of the nature and extent of the warranty as it applies to hull and gear.[78]

To lay down prior misconduct as the test of "unseaworthiness" in fight and assault cases is to apply correctly and logically those same principles to the case of personnel. As with the ship's appurtenances, there must exist a real defect in order to constitute unseaworthiness, a defect of sufficient duration to justify declaring the seaman "unseaworthy";[79] and, if he has not by prior conduct in fact displayed some degree of vicious tendencies, he certainly cannot be branded as "unseaworthy", that is, as unfit to sail.[80]

Thus, the present legal test of determining liability by the prior conduct of the offending party, affords a sound legal basis of ascertaining genuine seaworthiness or lack

---

[76]petitioner's brief p. 14.

[77]*Cookingham v. United States*, 184 F. (2d) 213 (C. C. A. 3d 1950); cert. den. 340 U. S. 935, 71 S. Ct. 475; *Adamowski v. Gulf Steel Corp.*, 197 F. (2d) 523 (C. C. A. 3d 1952); cert. den. 96 L. Ed. 1324; *Garrison v. United States*, 121 F. Supp. 617 (D. C. Col. 1954); *Daniels v. Pacific-Atlantic S. S. Co.*, 120 F. Supp. 96 (D. Ct. N. Y. 1954); *Balado v. Lykes Bros. S. S. Co., Inc.*, 179 F. (2d) 943 (C. C. A. 2d 1950).

[78]petitioner's brief p. 14-15.

[79]*Supra*, Note 77.

[80]*Jones v. Lykes Bros. S. S. Co., Inc., supra* Note 41. The court stated: " We are not satisfied that the finding proved that Hunter was a man unfit to serve . . . "

of it, and is a standard or test which should not be disturbed.

POINT III.

THE PRESENCE OF THE OFFENDING SEAMAN, GONZALES, ABOARD THE SS MASON LYKES DID NOT RENDER HER UNSEAWORTHY.

The District Court did not know of the *Jones* decision when it decided the present case.[81] It is fair to assume, as the Court of Appeals assumed,[82] that the District Court would not have thought that this was a case for the application of the "equal in disposition" standard if it had known that the Second Circuit, the creators of the standard, would themselves refuse to apply it in favor of the victim in the *Jones* case.

A fair reading of the record will disclose that it contains no substantial evidence to support the application of the *Keen* standard.

It is regretable that it becomes necessary in this court to correct petitioner's numerous erroneous statements of fact. The court, itself examining the record, will readily see that petitioner's assertion of Gonzales's "general reputation for belligerence"[83] is without support in the evi-

---

[81]R. 479; The District Court here rendered judgment on May 15, 1953; *Jones v. Lykes Bros. S. S. Co., Inc., supra* Note 41, judgment rendered June 4, 1953.

[82]R. 509-510.

[83]petitioner's brief p. 10, 28.

dence. The only such purported testimony was that of Boudoin, himself, and it shows plainly that he did not have any knowledge at all of Gonzales's "general reputation."[84]

The accusation that Gonzales, after Boudoin's injury, obtained a knife,[85] will be seen by checking petitioner's footnote references, to be derived entirely from certain unsworn statements attached to the log book, specifically excluded by the trial judge, not once, but several times,[86] and petitioner did not appeal from these rulings.[87] These un-

---

[84]R. 89 where the record reads:

"BY THE COURT:

". . . Let's be more specific than that. Let the plaintiff say whether or not he heard the reputation of Gonzales discussed, and then get the particular *incidents* on board the ship which possibly should have been known to the other members of the crew.

"QUESTION: You understand what I mean by the man's reputation?

"ANSWER: You mean his conduct.

"THE COURT: What other people think about him?

"ANSWER: What other people think about him?

"QUESTION: Yes, think about him.

"ANSWER: Well, what other people think about him, that is pretty hard to say, Your Honor."

In other words, this testimony clearly shows that petitioner did not and could not testify concerning Gonzales's "general reputation", and that his testimony was limited to his own opinion.

[85]petitioner's brief, p. 10.

[86]R. 56, 58, 62, 69, 72, 240-243; the court stated at p. 243:

"Let's make it *crystal clear*. The log is admitted in evidence. The statements, except the two statements, are *excluded*." (Emphasis ours); the two statements referred to by the court are the statements of the master and chief officer. The excluded statements were rightfully excluded; see *Palmer v. Hoffman*, 318 U. S. 109, 65 S. Ct. 477, 87 L. Ed. 645 (1943); *Chapman et ux v. United States*, 194 F. (2d) 974 (C. C. A. 5th 1952); *New York Life Insurance Co. v. Taylor*, 147 F. (2d) 297 (C. C. A. Dist. of Col. 1944); *Naylor v. Isthmian S. S. Co.*, 189 F. (2d) 538 (C. C. A. 2d 1951). However, the issue of admissibility is not before the court as petitioner did not appeal the ruling excluding the statements and it was not raised in the application for certiorari.

[87]R. 498.

sworn statements of witnesses who did not appear in the case,[88] are not part of the application for the writ;[89] no error was assigned against their obviously correct exclusion;[90] and petitioner's reference to them, and his confection of whole arguments upon them, constitute a gratuitous excursion from the record, an excursion which can properly be ignored.

A reading of the evidence will also disclose to the court that, except for the incidents of the present case, Gonzales has a good record. We have already adverted at length to that good record[90A] and it is not necessary to repeat it here. Suffice to say that the record of Gonzales, after years of service with the Merchant Marine,[90B] was free of any misconduct involving assaults or attacks;[91] and that he still remains in complete good standing with the Coast Guard,[92] and with his and Boudoin's union.[93] There is nothing in his record to justify the finding of fact that he was not of "equal disposition" with the "average" seaman. Even under the standard of *Keen*, his "disposition" was "equal" and nothing would have required a reasonable shipowner, with

---

[88]These unsworn, excluded statements are not only attached to the log book, but were read into the record during the course of several depositions.

[89]petitioner's application and brief for certiorari.

[90]*Supra*, Note 87.

[90A]*Supra*, Notes 20-24.

[90B]*Supra*, Note 20.

[91]*Supra*, Note 22, 23.

[92]*Supra*, Note 24.

[93]*Supra*, Note 21; Petitioner, however, was expelled from the union (National Maritime Union) (See R. 111) after leaving the Mason Lykes. This undoubtedly resulted from his activities aboard the ship (See R. 111) and his excessive drinking. (R. 49-54, 108-110).

full knowledge of his background, to reject him as being "unseaworthy", that is, unfit to sail. The court well knows that many thoroughly competent and excellently qualified seamen have displayed at least one period of misconduct from drinking. A single set of such circumstances does not, in the words of the Second Circuit in the *Jones* case, establish Gonzales as a "man unfit to serve, judged by the usual standards of the calling".[94] Certainly, nothing which Gonzales did in this case — even viewed in its most unfavorable light — justifies his forever being deprived of his livelihood as a seaman; but that harsh result will follow as a matter of course if the District Court is held to have been right, and if his mere presence aboard a vessel will render her unseaworthy.

It is submitted that the MASON LYKES, even by the *Keen* standard, was not unseaworthy because of having Gonzales in the crew, and, even accepting that standard, the case, on its facts, is not one of liability.

POINT IV

THE SS MASON LYKES WAS NOT NEGLIGENT

(A) THE FACTS

In addition to the theory of unseaworthiness, the District Court held the shipowner liable in damages on a theory of the supposedly negligent violation of the duty of the ship's officers to suppress disorderly acts of seamen which might reasonably be expected to result in injury to other

---

[94] *Supra*, Note 80.

members of the crew.[95] Generally speaking, this principle of law is sound, but the Court of Appeals correctly concluded that it has no application to the facts of this case, since the record discloses that there is no substantial evidence upon which to support such a finding.[96]

Petitioner attempts to develop by repetition the contention that the three men were "boisterous", that they "could have been heard in the messhall . . . and passageway", and that their drinking should have been suppressed by the night mate, who is said to have "frequently inspected" the crew's quarters.[97]

There is no evidence that the night mate or any other officer had any knowledge of the drinking. The District Court, knowing that there was no evidence of actual knowledge, concluded that the officers "knew or should have known" that drinking was taking place, and therefore should have taken steps to suppress it.[98]

Reduced to its fundamentals, the only testimony purporting to sustain this theory was Boudoin's own testimony that the three men were loud and noisy;[99] but that this alleged disturbance did not in fact exist is actually shown by Boudoin's own testimony. Boudoin admitted that he "wouldn't say" that the "noise carried through the vessel"; that "if you were on the opposite side of the mess hall", which was located just two or three feet across the passageway from

---

[95]R. 487.
[96]R. 510-511.
[97]petitioner's brief p. 9, 10, 28, 34.
[98]*Supra*, Note 95.
[99]R. 78-80.

the room where the drinking was taking place,[99A] you couldn't tell whether the noise was "cargo winches or the noises in the ship, or natives ashore on the dock or what it was."[100] This testimony from Boudoin himself establishes that the night mate on duty, required to make only one routine inspection in the two hours or less during which the men were drinking,[101] would have hardly been likely to hear them. This one routine inspection by the night mate at 1 o'clock did not involve his entering the rooms of the seamen. The custom of the sea prohibited his so doing.[102] Furthermore, Boudoin's testimony is limited to the one short period when he passed by the room in question.[103]

Also absent from the record is any testimony so much as suggesting that the officers or any members of the crew were disturbed by the three men. In fact, Boudoin, up at 1:30 a.m. to get a sandwich, went on back to bed and to sleep, leaving open the door of his room, only a short distance from the room where the drinking was taking place.[104] Later, when Gonzales entered Boudoin's room, through the still open door, Boudoin was asleep or almost asleep, and himself had not been kept awake by the alleged "loud and boisterous" noise.[105] No one — not even Boudoin — ever complained of having been disturbed by that "loud and boisterous" noise, for not suppressing which the officers are now claimed to have been at fault.

99A R. 78-79.
100 R. 82-83.
101 R. 81 where petitioner stated: "The officer on watch in port is supposed to make his rounds *once an hour*, check the cargo hatches and everything."
102 petitioner's brief p. 32; R. 439.
103 *Supra*, Note 100.
104 *Supra*, Notes 11, 12.
105 Ibid.

The argument of counsel, however deftly, attractively or vigorously urged, cannot supply the deficiencies of evidence, nor create evidence which does not exist, nor alter the plain facts of the case. Thus, petitioner, grasping for evidence which does not exist, charges that the gangway watchman, in not reporting Gonzales and his companions to the night mate when they returned to the ship, failed in his duty to report the presence of "badly intoxicated" seamen.[106] This charge is wholly answered by the complete lack of evidence that the three men were intoxicated when they returned at midnight. So, too, the attacks made by the petitioner on the master and the chief officer are efforts to plant fault where none exists. The charge that the master had not ordered the gangway watchman to report the presence of intoxicated seamen aboard the ship[107] is disproved by the fact, which the record establishes without contradiction, that it was the "routine duty" of the watchman so to do.[108] The attack upon the chief officer is likewise unfounded; at no time did he "knowingly permit" consumption of liquor aboard the ship;[109] he himself had no liquor aboard the ship on the voyage in question;[110] and there is no evidence that at any time had he consumed liquor aboard the ship.[111]

We should suppose, of course, that even petitioner would concede that a person is not to be held negligent when he has performed all that is humanly and reasonably re-

---

[106]petitioner's brief p. 34.
[107]Ibid 34, 35.
[108]R. 324.
[109]R. 383.
[110]R. 383-384.
[111]Ibid.

quired of him. The record will show, by Boudoin's own repeated statements,[112] that respondent promulgated rules against shipboard drinking and at all times, to the extent that it is humanly possible so to do, has sought to prevent the consumption of liquor aboard ship.[113] Petitioner has been unable to point to a single instance when shipboard drinking, known to the vessel's officers, was allowed to continue. The prompt and forceful way in which Captain Townsend and Chief Officer Staggers confiscated Gonzales's liquor and threw it overboard;[114] the way in which Captain Townsend disciplined Gonzales,[115] logged him for his misconduct, [116] and discharged him at the end of the voyage,[117] despite the efforts of his shipmates to have him remain in the crew of the vessel;[118] all of this shows the true attitude of respondent and of the ship's officers to shipboard drinking and fighting.[118A] The assertion of petitioner that respondent is "lax" and "indifferent"[119] to shipboard drinking and fighting is thus seen to be a mere fic-

---

[112]petitioner's brief 12, 27, 30.

[113]R. 147, 383.

[114]R. 271-272.

[115]R. 272, 337-338, 351.

[116]R. 273.

[117]R. 274.

[118]Ibid; 339.

[118A]R. 324.

[119]petitioner's brief 35.

tion, unsubstantiated by any shred of evidence in this case.[120]

Thus, it is abundantly clear that the record does not support the District Court's finding that the officers had constructive knowledge that the three men were drinking in the forecastle, or that the men were guilty of disorderly acts likely to result in personal injury; and the Court of Appeals correctly so concluded.

(B) *THE LAW*

There is no basis for the finding that the ship's officers knew or should have known the men were drinking on board the ship, or for the trial judge's equally erroneous

---

[120]R. 507. Petitioner, in addition to the unfounded assertions against the ship's officers, attacks respondent's claims representative, vice president, and assistant manager of the marine division. (See petitioner's brief, pps. 35-36). What relevancy this may have to a cause of action predicated upon negligence under the Jones Act is difficult to see. Moreover, petitioner's assertions are unfounded: (1) Mr. Beyer, a claims representative, *who was called during the trial by petitioner's service of a subpoena duces tecum* (R. 246) is charged with not having an "index card" on the misconduct of Gonzales. As a claims representative, Mr. Beyer would maintain cards *only* under the names of seamen who sustain injuries and thus would have potential claims. His diligence is demonstrated by his having a card on a very minor injury Gonzales sustained. (R. 250) (2) The charge against Mr. Biggers is likewise unfounded. He too *was called by petitioner during the course of the trial.* (R. 206) He is attacked by isolating his answer to a hypothetical question to the effect that he would employ a sailor who had a fight. A full reading of his testimony will show that he did not consider a sailor who had a fight automatically barred from the sea, particularly when the loser made no complaint. (3) The attack on Vice President Jimison is grounded solely in the reemployment of Gonzales some time after his dismissal from the MASON LYKES. But before the hiring hall sent Gonzales back to Lykes, the Union investigated the Boudoin case, disciplined and dismissed, not Gonzales but Boudoin, and retained Gonzales in good standing. (R. 211, 212, 213).

finding that the officers should have anticipated that the drinking "might lead to an assault by one seaman on another",[121] — a finding beyond the scope of the elementary rules of proximate cause.[120A] The facts here disclose that this was not an ordinary drunken fight, nor the consummation of a long and loud dispute, but was the result of the unforseen and wholly unforeseeable actions of Gonzales. Viewed most favorably to petitioner, it was neither natural nor probable that the drinking and talking of Gonzales and his companions would lead to one of them leaving the room, going to Boudoin's room, attempting to obtain his bottle, and then, when grabbed by him, in the ensuing tussle striking him with the bottle. The injury to Boudoin in those circumstances is entirely beyond the realm of forseeability, and cannot be said to have been a natural and probable consequence of the mere fact of several men sitting about in a seaman's forecastle engaged in drinks and tall tales.

When men are repeatedly violent and belligerent, as in the *Koehler* case, [122] or make extensive preparations for a fistic encounter, as in the *Jensen* case, [123] or are unrestrained because the ship's officers repeatedly condone fighting and disorderly conduct of which they have full

---

120AIt is too well established to require further comment that the basis of an action under the *Jones Act* is negligence, and, to recover, the seaman must allege and prove that the defendant was negligent (See 46 U.S.C.A. 688; *Pittsburgh v. Palo*, 64 F. (2d) 198 (C. C. A. (6th) 1933); and it is equally well established that the negligence complained of must be the *proximate* cause of the injury. See *Brady v. Southern Railway Company*, 320 U.S. 476, 64 S. Ct. 232, 88 L. Ed. 239; *Reynolds v. Atlantic Coast Line R. Co.*, 196 F. (2d) 643 (C. C. A. (5th) 1952).

121R. 487.

122*Koehler v. Presque-Isle Transportation Co.*, 141 F. (2d) 490, 1944 AMC 432 (CCA 2d).

123*Jensen v. United States* 184 F. (2) 72, 1950 AMC 1797 (CCA 3d).

knowledge, as in *Stankiewicz* case, [124] there is possibly some justification for the conclusion that their actions might "reasonably be expected to result in injury to others." But men engaged in drinking in a friendly gathering, unaccompanied by violence or boisterousness, as here[125], are not performing such open and obvious acts as to call to themselves the attention of the ship's officers. Thus the Court of Appeals correctly concluded that none of the officers knew, and none should have anticipated, that the drinking incident would lead to personal injury.[126] There is nothing unusual about the friendly gathering of seamen in one another's forecastles, and such a gathering would not of

---

[124] *Stankiewicz v. United Fruit S S Corp., et al,* 123 F. Supp. 714 (Dist. Ct. N. Y. 1954) In the *Koehler* case there was evidence of (1) *prior* misconduct by the assailant which was *known* to the vessel's officers (the Second Officer saw the assailant "pick" a fight and "beat up" a fellow seaman); (2) The Third Officer *saw* the assailant yelling and swearing at the plaintiff; (3) the plaintiff *told* the Second Officer, *prior* to the assault in question, that the assailant *had attacked him;* and finally (4) there was evidence that indicated the officers *knew* the assailant was "waiting for" the plaintiff, to attack him. In the *Jensen* case the evidence established (1) that one of the ship's officers *told* the assailant to refrain from fighting a fellow crew member until both men returned to the vessel; (2) that it was the *custom* on the vessel to permit crew members *to fight*, the officers condoning the improvising of a hatch cover as a fighting area; (3) that the condoned custom was observed in the involved incident,the ship's officers *acting as anxious boxing spectators,* and the vessel's floodlights illuminating the improvised arena. The plaintiff was injured as he attempted to prevent the assailant from using a knife on his boxing opponent. In the *Stankiewicz* case, the evidence regarding the assailant indicated that on *several occasions* he boarded the vessel intoxicated, *engaged in fights which were actually observed by the ship's officers,* and that the assailant, on the date in question, was drinkin on board the ship. The court merely held that these facts created a question for trial on the merits. It is obvious that these three decisions have absolutely no bearing whatsoever upon the instant problem.

[125] *Supra,* p. 26-27.

[126] R. 510-511.

itself lead one to anticipate that personal injury, particularly to a person outside the group, might result.

McAllister v. United States of America[127] has no application to the instant case. The test of that case for the correctness of the District Court's findings, applied to those here, shows that they were "clearly erroneous." That question, properly presented to the District Court in our case, was properly passed upon by the Court of Appeals, and the findings of the District Court were properly reversed. In *McAllister* there was sufficient evidence to support the District Court's finding of negligence; here, the record does not support those findings. Indeed, an examination of our record reveals that the District Court predicated a good part of its findings solely on certain unsworn statements which the District Court itself had correctly excluded.[128] Furthermore, *McAllister* is not pertinent because, with the exception of Boudoin's own testimony, all the factual evidence in our case concerning what occurred aboard the vessel was introduced by deposition. It is well settled that the presumption in favor of the District Court's findings is not so strong where the case is tried on depositions, since the Court of Appeals is as able to weigh deposition evidence as is the District Court.[129] The point here, however, is not one of weight of evidence, but of the total lack of any substantial evidence to sustain judgment in favor of Boudoin.

---

[127] 99 L. Ed. 13 (1954).
[128] *Supra*, Note 86.
[129] *Carter Oil Co. v. McQuigg*, 112 F. (2d) 275 (C. C. A. 7th 1940); *Pacific Portland Cement Co. v. Food Mach. and Chem. Corp.*, 178 F. (2d) 541 (C. C. A. 9th 1949); *Fleming v. Palmer*, 123 F. (2d) 749 (C. C. A. 1st 1941), cert. den. 316 U. S. 662, 62 S. Ct. 942, 86 L. Ed. 1739 (1942).

That was the basis, and, we submit, the proper basis, of the Court of Appeals' reversal on this phase of the case.

* * * * * *

The assumption of petitioner that the shipowner's duty to furnish a safe place to work forms any basis of liability under the facts of this case[130] is a false assumption predicated upon the false theory that such a duty exists independently of negligence or of unseaworthiness. It is well established that in order to permit recovery for breach of the obligation of a safe place to work there must be an affirmative showing that the shipowner was negligent or that the ship was unseaworthy.[131]

Petitioner's concluding argument[132] apparently is that the mere assault by Gonzales, in and of itself and with nothing more, is an act of negligence under the *Jones Act*. This is a palpable afterthought, not urged in the District Court,[133] not part of the District Court's findings,[134] not urged to nor considered by the Court of Appeals,[135] and not a question tendered here by the application for the writ.[136] Aside from this, however, this unsound theory is disposed of by the many decisions holding that a shipowner is not liable under the *Jones Act* for fights, altercations, or other disturbances among unlicensed personnel when such mat-

---

130 petitioner's brief, p. 32.
131 *Rouchleau v. Silva*, 1950 AMC, 673; *Biles v. United States*, 1949 AMC 875; *Vojkovich v. Ursich*, 121 P. (2d) 803, 49 Cal. App. (2d) 268 (1942).
132 Petitioner's Brief p. 37.
133 R. 498.
134 R. 486-487.
135 Ibid; See also R. 502-511.
136 Petition and Brief for Certiorari.

ters are unrelated to the ship's business.[137] The basis for this rule, so fundamental in all laws governing employer-employee relationship, is that an employer does not hire one employee to assault another, and can only be liable when the assault is committed by one having authority over the other and then only when he is in the furtherance of the employer's business.[138] The case of *Steely v. Kern*[139] put forward by petitioner as purported authority for abolishing these basic standards of liability had no such scope or effect. That case, which did not involve an assault or similar altercation, is authority only for the proposition that the intent to do harm may, under certain circumstances, amount to negligence under the Federal Employers' Liability Act. That was exactly what the court held in *Jamison v. Encarnacion*,[140] the well known authority for the proposition that intentional torts, committed in the line of duty, and not those involving mere personal engagements, are actionable negligence under the *Jones Act*. In our case the actions of Gonzales, viewed in the light most favorable to petitioner, cannot by any stretch be said to have been committed in the line of duty or in the furtherance of the employer's business.

---

[137] *Davis v. Green*, 260 U. S. 349, 43 S. Ct. 123, 67 L. Ed. 299 (1922); *Jamison v. Encarnacion*, 281 U. S. 635, 1930 AMC 1129; *Cain v. Alpha S. S. Co.*, 281 U. S. 642, 1930 AMC 1133; *Buralis v. United States*, 79 F. Supp. 963 (Dist. Ct. N. Y. 1948) the court holding that an assistant engineer is *not* acting in furtherance of the employer's business in assaulting another officer; *Nowery v. Smith et al*, 69 F. Supp. 755 (Dist. Ct. Penn. 1946) where the injuries resulted from a fist fight with the Chief Engineer, the court held that the Chief Engineer was *not* acting as an officer of the ship and therefore the assault was *not* committed while he was acting *within the scope of his employment*; See also *Kable v. United States*, *supra*, Note 2.

[138] Ibid

[139] 313 U. S. 545 (1941).

[140] *Supra*, Note 137.

CONCLUSION

It is submitted that under the principles of the general maritime law the mere presence of Gonzales aboard the vessel did not render her "unseaworthy"; that what Gonzales did, viewed even most favorably for petitioner, does not justify branding either his ship or him "unseaworthy", with consequent deprivation of his means of livelihood. The benevolent provisions of the maritime law already afford ample bases of seamen's damages. Extension of the shipowner's liability without fault into the wholly new area of permitting recovery in a purely personal encounter, unrelated to the ship's business, is not required by any social, economic or legal consideration. Finally, as to the allegations of negligence, they are without any substantial factual support and cannot sustain judgment against respondent under the *Jones Act*.

Accordingly, it is submitted that the decision of the Court of Appeals was correct and should be affirmed.

Respectfully,

JOS. M. RAULT
ANDREW R. MARTINEZ
WILLIAM E. WRIGHT
825 Whitney Bldg.
New Orleans, La.
Attorneys for Respondent

TERRIBERRY, YOUNG, RAULT & CARROLL
Of Counsel

CERTIFICATE

I, Joseph M. Rault, counsel for respondent, Lykes Bros. Steamship Co., Inc., and a member of the bar of the Supreme Court of the United States, hereby certify that on the 4th day of February, 1955, I served copies of the foregoing brief on counsel for all parties of record by mailing copies to their offices in duly addressed envelopes.

_____

Jos. M. Rault

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
JAN 25 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 406

ELIE J. BOUDOIN,
Petitioner,

v.

LYKES BROS. STEAMSHIP CO., INC.,
Respondent.

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* ON BEHALF OF THE AMERICAN MERCHANT MARINE INSTITUTE, INC.

JOHN J. BURNS,
Counsel for Amicus Curiae, American Merchant Marine Institute, Inc.,
40 Wall Street,
New York 5, New York.

ALBERT E. RICE,
BURNS, CURRIE, RICH & RICE,
Of Counsel.

APPEAL PRINTING CO. INC., 130 CEDAR ST., NEW YORK, WORTH 4-3033

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 406

ELIE J. BOUDOIN,
Petitioner,

v.

LYKES BROS. STEAMSHIP CO., INC.,
Respondent.

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* ON BEHALF OF THE AMERICAN MERCHANT MARINE INSTITUTE, INC.

The American Merchant Marine Institute, Inc. respectfully moves the Court for permission to file a brief *amicus curiae* in this case. The consent to the filing of such a brief was granted by the respondent, but was refused by the petitioner.

The American Merchant Marine Institute, Inc. is a non-profit New York membership corporation. The membership of the Institute includes 65 steamship companies which operate dry cargo and passenger vessels, colliers and tankers having a gross tonnage of nearly 6,750,000 tons. This represents about 60% of the privately-owned American-flag merchant marine now operating in our foreign and domestic trades.

The member companies are directly and deeply concerned with the effect of any decision by the Court in this

case which would extend further the liability of an operator of an American vessel.

In their briefs to the Circuit Court of Appeals, neither the petitioner nor the respondent presented to the court facts and arguments based upon the economic and broad social aspects of the case herein, and the petitioner has not done so in his brief on the merits. It does not appear likely, therefore, that these facts and arguments will become available to the Court.

It is respectfully submitted that current information as to maritime hiring practices, the economic position of American seamen with respect both to the employers and to workers in other industries, comparable costs of operating American-flag vessels and foreign-flag vessels, and the economic conditions of the maritime industry in the United States may be very valuable to the Court in its adjudication of this case, and permission is requested to file the accompanying brief as *amicus curiae*.

Respectfully submitted,

JOHN J. BURNS,
Counsel for American Merchant Marine Institute, Inc.,
40 Wall Street,
New York 5, New York.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FEB 2 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 406

ELIE J. BOUDOIN,
Petitioner,

v.

LYKES BROS. STEAMSHIP CO., INC.,
Respondent.

BRIEF ON BEHALF OF THE AMERICAN MERCHANT MARINE INSTITUTE, INC. AS *AMICUS CURIAE*

JOHN J. BURNS,
Counsel for American Merchant Marine Institute, Inc., as Amicus Curiae.
40 Wall Street,
New York 5, New York.

ALBERT E. RICE,
BURNS, CURRIE, RICH & RICE,
Of Counsel.

APPEAL PRINTING CO. INC., 130 CEDAR ST., NEW YORK, WORTH 4-3033

INDEX

PAGE

STATEMENT OF INTEREST AND SCOPE OF BRIEF 1

SUMMARY OF ARGUMENT 2

ARGUMENT

I—The Current Status of The American Seaman Does Not Require or Justify Judicial Extension of His Rights 4

1. Earnings of American Seamen 5

2. Fringe Benefits 8

3. Working Conditions 10

4. Changes in conditions controlled by the Courts or Legislature 11

5. Hiring Practices 12

II—Current Economic Status of American Shipping Companies 14

III—The Government and the Merchant Marine 18

CONCLUSION 22

CERTIFICATE OF SERVICE 23

Tables of Cases Cited

Halcyon Lines v. *Haenn Ship Ceiling and Refitting Corp.*, 342 U. S. 282, 286 (1952) 21

Keen v. *Overseas Tankship Corporation*, 194 F. (2d) 815 (CA 2d, 1952) 3n

Pope & Talbot, Inc. v. *Hawn*, 346 U. S. 406 (1953) 2, 14

Seas Shipping Company v. *Sieracki*, 328 U. S. 85 (1946) 2, 3n

Other Authorities Cited

PAGE

"American Merchant Marine and the Federal Tax Policy", Report to the President by the Secretary of Commerce (1952) 18n

American Merchant Marine Institute, Inc. Research Report No. 54-17, December 1954 ..... 14n

"Analysis of Construction and Operating Subsidies under the Merchant Marine Act, 1936, as amended", submitted by The Ocean Shipping Panel to The Transportation Council for the Department of Commerce (1953) 18n

Budget Message to Congress of President Eisenhower, January 17, 1955 ..... 18n, 19n

"Industrial Relations in the Ocean Shipping Industry", Report of Industrial Relations Counselors, Inc. to Maritime Industry Survey Committee (1953) 5n, 6n, 7n, 12n, 13n

"Maritime Subsidy Policy", Office of the Under Secretary of Commerce for Transportation and the Maritime Administration, April 1954 ..... 16, 17, 18n

Merchant Marine Act, 1936, 46 U. S. C. 1101 ..... 18n

"Ocean Transportation", Carl E. McDowell and Helen M. Gibbs (New York, 1954) 12n, 15, 20

Public Law 664, 83rd Cong., 2d Sess. 14n

"Seamen, Seaworthiness, and the Rights of Harbor Workers", Francis L. Tetreault, 39 Cornell L. Q. 381 (1954) 4n, 21

"Survey, The American Merchant Marine Policies and Problems", Report of the House Committee on Merchant Marine and Fisheries, 83rd Cong., 2d Sess., 1954 ..... 18n

"Tramp Shipping and the American Merchant Marine", Report of the American Tramp Shipowners Association, Inc., February 1954 ..... 15n

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 406

ELIE J. BOUDOIN,
Petitioner,

v.

LYKES BROS. STEAMSHIP CO., INC.,
Respondent.

BRIEF ON BEHALF OF THE AMERICAN MERCHANT MARINE INSTITUTE, INC. AS *AMICUS CURIAE*

STATEMENT OF INTEREST AND SCOPE OF BRIEF

This brief as *amicus curiae* is filed on behalf of the American Merchant Marine Institute, Inc., a non-profit New York membership corporation. The membership of the Institute includes 65 steamship companies which operate dry cargo and passenger vessels, tankers and colliers having a gross tonnage of nearly 6,750,000 tons. This represents about 60% of the privately-owned American-flag merchant marine now active in our foreign and domestic trades.

The members of the Institute have a direct and immediate interest in this case, and are deeply concerned by

the possibility of a decision which would extend further the liability of an operator of an American vessel with respect to the crew, and which could be the basis for additional liability as to a broad class of other workers upon the vessel. *Seas Shipping Company* v. *Sieracki*, 328 U. S. 85 (1946); *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406 (1953).

This brief is addressed to the issue of whether the operator of a vessel, in the absence of fault, should be held liable for injuries inflicted by an unlicensed seaman upon a fellow unlicensed crew member. Stated otherwise, this issue involves the determination of whether the doctrine of seaworthiness should be extended to impose upon a ship operator an absolute liability for all acts of members of the crew.

It is respectfully submitted that developments within the last few years affecting the economic and social status of seamen and the economic condition of the industry itself make unwarranted any such judicial extension of liability. This case provides the Court with an opportunity to reexamine the premises and policies providing the basis in recent years for decisions that have enlarged the doctrine of seaworthiness and that have extended such doctrine to give extra protection to a broad class of workers other than those actually employed as seamen on American vessels.

Summary of Argument

The decisions of this Court and those of the lower Federal courts within the last generation resulting in the extension of rights to seamen and others who work aboard vessels have been formulated within the traditional power of the Admiralty Court to correct abuses and protect underprivileged seamen as "wards" of the court. Also

prominent in the decisions has been the premise that the imposition of liability, regardless of any other factors, is warranted where insurance would spread the cost.[1]

By the very nature of the judicial process, it is impossible that during this period as each case came up the lower courts or the Supreme Court could have been presented with facts indicating the then currently existing relationship between seamen and their employers, or of the nature and condition of the shipping industry.

This lag between the facts before the appeal court and the existing general conditions, which are rarely at issue in a given case, is worthy of the most serious consideration. Within the space of a few years there has been a startling change in the overall status of seamen. As a matter of fact, many of the advances which have so greatly altered the traditional relationship of the seaman and his employer have actually occurred within the period of this case. American seamen now have achieved such tremendous economic gains as to rank with the most privileged workers in the country. They are able to wield sufficient power as a group to control much of the hiring procedure, and they are able to enforce changes in many practices formerly left to the slower process of legislation or judicial decision. At the same time American shipping is a sick industry, and more and more companies are becoming largely dependent upon government assistance.

In the light of the present position of seamen, the condition of the industry, and the interdependence of government and the industry, this Court should reexamine the policies and premises inherent in recent decisions to determine whether any further judicial extension of liability of a ship operator should be effected by the Court.

(1) *Seas Shipping Company, Inc.* v. *Sieracki*, 328 U. S. 85 (1946); *Keen* v. *Overseas Tankship Corporation*, 194F(2d) 815 (CA 2d, 1952).

ARGUMENT

I

The Current Status of The American Seaman Does Not Require or Justify Judicial Extension of His Rights.

In the past both the courts and the legislature had a reasonable basis to accept the traditional attitude that seamen require special benefits and protection. As a result, there was a steady expansion of the rights and privileges to which seamen were entitled, over and above corresponding rights and privileges for other workers.[2]

These legal doctrines reflecting old ideas of the economic status of the seafarer have little justification in the light of the modern facts of maritime life, and no extension of the rights of seamen should be considered without examination of the recent changes in the relationship of American seamen and their employers.

Generally speaking, the American seaman has made up for all the deficiencies of the past in the few years since the advent of collective bargaining in the industry. Some improvements were instituted prior to 1940, but the most conspicuous advances have actually occurred in the comparatively short space of time since the conclusion of World War II.

Now a seaman is one of the most highly privileged of American workers. His wages rank with the highest; he receives "fringe" benefits which compare with any in the country; and he has other rights and benefits which, in the aggregate, equal or exceed those of other workers.

(2) *Seamen, Seaworthiness, and the Rights of Harbor Workers*, Francis L. Tetreault, 39 Cornell L. Q. 381 (1954).

1. Earnings of American Seamen.

Little more than a generation ago the average seaman on an American vessel was a sub-standard worker who was paid low wages and who was often forced to work under conditions which could not compare to those in other industries.

After 1937, the shipping industry became almost fully unionized, and collective bargaining soon resulted in improved wages and working conditions for seamen. Nevertheless, as late as 1939 the average earnings of an Able Seaman were only $82 per month.[3] Although substantial advances were made during the war years, the most outstanding developments in the economic relationship of seamen and ship operators have occurred since 1946. In this brief span of years and for a variety of reasons, seagoing workers have been able to make advances both in earnings and conditions which go far beyond those won by any other class of American workers. As an example, the Able Seaman now averages about $528.65 per month, without counting other substantial benefits he receives. This represents *more than 600%* of his 1939 pay.

The following chart,[4] providing the current monthly earnings of the crew of a C-2 dry cargo vessel operating out of an Atlantic Coast port, presents a fair picture of

(3) *Industrial Relations in the Ocean Shipping Industry*, Report of Industrial Relations Counselors, Inc. to Maritime Industry Survey Committee (1953). For purposes of wage studies the Able Seaman is customarily considered the "average" seaman.

(4) Based upon study in 1952 by Industrial Relations Counselors, Inc., adjusted for increases in base wages and overtime rates received in 1953 as result of collective bargaining.

the present earnings of a crew on most American-flag vessels:

	Base Wage	Overtime	Total
Master	$1,124.07	$ —	$1,124.07
Chief Mate	737.10	257.58	994.68
2nd Mate	553.91	261.82	815.73
3rd Mate	510.66	256.52	767.18
4th Mate	467.99	283.02	751.01
Radio Officer	501.71	199.28	700.99
Boatswain	400.68	212.00	612.68
Carpenter	375.08	173.84	548.92
Deck Maintenance	343.98	186.16	530.14
A B	314.41	214.24	528.65
O S	244.19	174.42	418.61
Chief Engineer	1,030.84	—	1,030.84
1st Asst. Engineer	737.38	290.44	1,027.82
2nd Asst. Engineer	554.34	265.00	819.34
3rd Asst. Engineer	511.48	216.24	727.72
4th Asst. Engineer	468.62	233.20	701.82
Electrician	499.25	210.94	710.19
2nd Electrician	465.09	171.72	636.81
Oiler	314.41	173.68	488.09
Fireman/Watertender	314.41	184.08	498.49
Wiper	294.30	57.12	351.42
Chief Steward	390.25	224.72	614.97
Chief Cook	361.18	198.22	559.40
Cook/Baker	361.17	198.22	559.39
Third Cook	310.43	193.44	503.87
Messman/Utilityman	242.32	135.66	377.98

A picture of the present earnings of seamen in itself does not provide by any means the full story of the gains made by the seagoing worker in the last fifteen years. A most comprehensive study of the entire situation was completed in 1953.[5] Covering the period through 1952, this study provides not only an analysis of the advances in earnings of seamen in relation to their former wages, but also a comparison of the economic status of seamen

(5) *Industrial Relations in the Ocean Shipping Industry*, supra.

and workers in other industries.[6] Indicative of the findings based upon data in 1945 and 1952, the report states (page 64):

> "* * * As these data indicate, earnings have increased at a faster rate in shipping than in any other branch of enterprise. In percentage terms—as shown more sharply in the accompanying chart—seamen's earnings have gone up nearly twice as much as earnings in manufacturing and building *construction, and more than twice as much as* shipyard and railroad earnings. Even in basic steel and automobile manufacturing—the 'pattern setting' industries of the postwar period—the increases have been considerably smaller than in shipping. Moreover, the current level of seamen's compensation is substantially higher than that of workers in any other industry. For example, while seamen's earnings were slightly below those of steel and automobile workers in 1945, by the Fall of 1952 they were 19 per cent higher than earnings in the steel industry and 21 per cent higher than earnings in automobile manufacturing."

The study also compared the average earnings of unlicensed seamen with those of railroad workers having substantially similar job classifications (page 77):

> "It is evident from this comparison that seamen generally, in all occupations, receive much higher

(6) Table 1, page 60. Comparison of Average Monthly Earnings of Unlicensed Seamen in Dry Cargo Ocean Shipping with Earnings of Production Workers in Manufacturing and with Consumers' Price Index, 1939 and 1952.

Item	1939	1952	1952 as Percentage of 1939
Average monthly earnings			
Unlicensed seamen	$ 82	$465	568%
Production workers in manufacturing	103	307	298
Consumers' price index	99.4	191.5	193

take-home pay than workers doing the same or similar work on railroads, as shown strikingly in the Chart that follows. In ten of the twelve individual comparisons the monthly earnings in the ship ratings exceed those in the corresponding railroad occupations by more than 50 per cent, and in three of the ten—the comparison of ship carpenters with railroad carpenters, that of ship electricians with railroad electrical maintenance workers and that of ship cooks with railroad chefs and cooks—the ship earnings are more than 75 per cent higher than the railroad earnings."

It is important to realize that the wage earnings of seamen which have been shown do not include the very substantial value of subsistence and quarters which seamen receive. These, of course, must be furnished as a necessary part of the business, but as a matter of valuation it may be noted that the various collective bargaining agreements provide that from $8 to $10 per day must be paid to seamen when board and lodging are not provided.

2. Fringe benefits.

As in the case of other industries, the steamship industry now provides very substantial "fringe" benefits. In some respects, these benefits go far beyond the normal for shoreside industries.

(a) Vacations.

As a result of the collective bargaining agreements in 1954, most seafaring workers, from the inexperienced ordinary seaman, wiper or messboy, who have just started working on ships, to the First Mate, will receive the equivalent of a *four-week* vacation for a year's work for one company, and Masters of vessels may receive from six to eight weeks' vacation. The institution since 1950 of

industry-wide vacation plans, administered jointly by employers and employees, has also provided a means of granting vacation credit for the short-term worker who is able to earn vacation credits even though his employment during the year is for more than one company.[7]

(b) Pension and Welfare Benefits.

The pension and welfare benefits now general throughout the shipping industry compare most favorably to similar benefits accorded in other industries and far exceed those in any industry having similar or comparable economic conditions.

Beginning in 1950, labor-management administered trusts have been established pursuant to collective bargaining for each of the various union groups. Under most of these trusts, which are financed solely by employer contributions, the welfare benefits have been very similar. In the case of the NMU Pension and Welfare Plan, covering a majority of the unlicensed seamen, the Plan provides to eligible seamen life insurance of $3,500, accidental death and dismemberment insurance of $3,500, and a weekly payment of $21 to any hospitalized seaman, even though he is receiving free treatment in a marine hospital. In addition to these benefits, the dependents of eligible seamen are entitled to liberal insured payments for hospital and surgical expenses.[8]

(7) The majority of the vacation plans provide that a seaman receives vacation credit for employment divided between any number of covered employers. Generally, he becomes entitled to receive a proportionate amount of a two-weeks' vacation.

(8) Dependency coverage for the NMU Plan, which is less elaborate than that in some other Plans, consists of a daily hospital benefit of $8, extra hospital services payment up to $80, a maternity benefit of up to $200, and payment for surgical expenses up to $150.

In an industry which, as we will see, has always been so speculative as to be unattractive generally to investors, the Pension Plans now in effect for unlicensed seamen are sufficient testimony to the new economic status of seamen. Within the last year the NMU Pension Plan on the Atlantic and Gulf Coasts was put into effect providing a basic pension of $55 (excluding Social Security) for unlicensed seamen after 20 years' service. At about the same time the Pacific Maritime Association established a basic pension of $100 per month for similar workers on the West Coast who had foregone certain wage increases given to those on the Atlantic and Gulf Coasts. Pension plans for licensed seamen, many of whom are beneficiaries of established company plans, are now under discussion.

3. Working Conditions.

The changes in earnings of seamen have been matched by changes in working conditions, and, obviously, no argument can be made that the old conditions, perhaps symbolic of the traditional low status of a seafarer, should not have been improved. The very nature of shipping requires limitations and hardships which are alien to most shoreside industries, but the Court may take notice, nevertheless, of the advances which seamen have made.

As a result of collective bargaining agreements as to scope of work (resulting in penalty payments when compliance is impossible or impracticable), the requirements of manning and required service by a seaman have been altered radically. No adequate analysis of this change has been made, but the increase in overtime or penalty payments to seamen, amounting to about 50% of base wages, represents a part of the consideration for meeting the necessary obligations thus imposed. As air conditioning has been used on new passenger vessels, its use has been

extended for the crew. On new dry cargo vessels and tankers the crew is also being provided with air conditioning, and, wherever possible, with enlarged and individualized quarters. Reports of the current construction of large new tankers state that they will include swimming pools for crew members.

Possibly the change in the status of seamen can be demonstrated more effectively by reference to more commonplace, every-day items. The NMU contract, as an example, requires a weekly change of bed linen. Towels must be changed twice weekly, with soap of the highest quality being furnished with each change. The furnishing of innerspring mattresses for all seamen is becoming more and more standard in the industry and consideration has been given to providing built-in bunks for everyone. It may be noted that one of the questions in the 1954 collective bargaining was the matter of *how many* automatic washing machines should be furnished for use of the crew.

4. Changes in conditions controlled by the Courts or Legislature.

The new status of the American seaman, able to exercise the power of collective bargaining, is shown not only in the tremendous increase in earnings at a time when the industry itself was not advancing economically, but also in the exercise of control over conditions which have traditionally been handled by the Admiralty Courts or by the Legislature.

It is unnecessary here to present to the Court any discussion of the development or extent of the doctrine of "maintenance and cure" under which seamen have received from the courts the right to recover for disability incurred during employment on a vessel. In recent years the Admiralty Courts have established the amount of

"maintenance and cure" at $6 per day. As an example of the new approach to such matters, and indicative of the ability of the seaman to require a more immediate approach to what he considers is needed under existing living conditions, the unions in 1953 in their collective bargaining agreements forced an increase in the payment to $8 per day.

In 1954 the CIO unions on the Atlantic and Gulf Coasts also negotiated new provisions to make more practicable the payment of maintenance and benefits when a seaman is in a foreign country, and more strictly defined the statutory provisions for pay-off on discharge.

5. Hiring Practices.

It is impossible to consider a question, as in the instant case, involving the liability of the steamship operator for the acts of his employees without consideration of the existing hiring procedures. The industry has advanced a long way since the days of chaotic hiring off the docks. As a result of collective bargaining, the union hiring hall has now become the normal method of employment.(9) Except for a very few exempt classifications in the categories closest to management, the hiring of seafarers is based on the rotary system which is designed to spread employment among a larger employable group than the jobs available. Subject only to the limitations of the Taft-Hartley Law, the maritime unions substantially control the men who are sent to secure jobs from the shipping companies. Under existing practice, it may be said that a shipping company, unless it is in a position to furnish reasonable objections to an applicant sent to it for em-

(9) *Ocean Transportation*, Carl E. McDowell and Helen M. Gibbs (New York, 1954) at page 211; Hiring Provisions and Practices, page 195, *Industrial Relations in the Ocean Shipping Industry*, *supra*.

ployment, must accept such applicant. This condition is obviously much more stringent in the case of entry ratings, such as ordinary seaman and wiper, or, in the case of passenger vessels, where the applicants for places in the Steward's Department usually have had no experience in shipping. Under these condition , it is obvious that in most instances under the current hiring practices the steamship company is in no position to have any knowledge of the "disposition" of its employee. The "disposition" of such an employee is more likely to be known by the fellow crew members who form a part of his own union.

A main disadvantage of the hiring hall system of employment from the standpoint of efficient ship management has been characterized as follows:[10]

> "* * * In the first place, it gives management little discretion in choosing its personnel. It is true that the employers have the right to reject unsuitable men referred to them, but that right is hardly a satisfactory substitute for the right to select men in the first instance. Moreover, the rotational dispatching feature tends to perpetuate below par seamen in the industry. If one company rejects a particular man on grounds of incompetence, his name is again placed on the list in the hiring hall, and in due course he is dispatched to another company."

In this case, the Court is presented with the curious problem of whether a ship operator should be held liable to members of the crew for the disposition and acts of an employee who was employed under conditions which are subject to the control of the very persons who might appear as plaintiffs. If the doctrine of seaworthiness

(10) *Industrial Relations in the Ocean Shipping Industry, supra*, page 198.

is carried out under the principle of the *Haven* case,[11] the end result would be even more extreme. Then a ship operator could be held liable to a longshoreman or other harbor worker for the "disposition" of the employee of another employer, who may have been selected, not by his own employer, but by the union or a government agency.

II

Current Economic Status of American Shipping Companies.

At a time when most of American industry is looking forward to a period of considerable prosperity, shipping companies currently hope merely that the slight upturn in world trade, aided by the beneficial effect of new legislation such as the law requiring participation of American ships in at least 50% of government-aid cargoes,[12] will create a slight improvement in conditions, enabling many to change from red to black and others to require less subsidy from the government in order to maintain a profitable operation.

American merchant marine shipping reached a low mark in 1954. By December 1, 1954 the privately-owned merchant marine fleet had dropped to 1,162 vessels, a shrinkage in one month of 17 vessels.[13] There has also been a substantial reduction in active tonnage from the lay-up of many ships, unable to find cargoes which would provide sufficient earnings to justify operation. As a matter of fact, in recognition of conditions which made it cheaper for many shipping companies to put their vessels in "moth balls" rather than operate at a loss, the Maritime

(11) *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406 (1953).

(12) The so-called "50/50 Law," Public Law 664, 83rd Cong., 2d Sess.

(13) Research Report No. 54-17, American Merchant Marine Institute, Inc., December 13, 1954.

Administration in 1954 permitted the transfer to foreign registry of more than 75 vessels. Other factors gave a further indication of the low state of American shipping. At least one subsidized operator had given up its subsidy contracts and turned to foreign-flag operation; a strong independent operator indicated that it must have government assistance in order to continue; and one of the old names in intercoastal shipping announced its withdrawal from the trade. There was further evidence that tramp shipping, an important segment of the industry, could not exist without direct or indirect government assistance.[14]

There has been general acceptance of the conclusion that except where shipping is part of an industrial operation, it is constantly faced with financial problems. In "The Problem of Shipping Finance",[15] it is pointed out in summary that American shipping capital is handicapped by a very large investment in vessels which is necessarily committed over an extended period of years, by an unsatisfactory earning record, and by a very small public investment participation. It is further pointed out that other stumbling blocks are created by a lack of industry unity and policy, by a vague and inconsistent government policy, and by a most serious problem of block obsolescence. The unattractiveness of shipping securities has been described as follows:[16]

> "Shipping securities are not too popular with the public. This is evidenced by the fact that during the last five years, taking Dow Jones selections, rail securities advanced by some 23 percent and indus-

(14) *Tramp Shipping and the American Merchant Marine*, report of the American Tramp Shipowners Association, Inc., February, 1954.

(15) *Ocean Transportation*, *supra*, chapter 14, page 274.

(16) *Ocean Transportation*, *supra*, page 275, report of address by James A. Farrell, Jr., February 28, 1952.

trials about 25 percent, while shipping securities actually declined. Because shipping earnings during this same period have been very good, the foregoing may sound paradoxical. Not to the investing public. They understand that shipping enterprises make good profits at times, but earnings fluctuate wildly over a long period, and worn out ships make poor dividends. The public is interested in steady income, even at lower rates. It is difficult, if not impossible to forecast a large rebuilding program primarily through the sale of new bonds, debentures or equity shares."

Although there is no unanimity as to what should be done, there is no disagreement as to the major reason why American shipping cannot operate profitably in other than war or "emergency" years without government assistance. The operator of an American-flag vessel is at a tremendous cost disadvantage compared with the foreign operator.

The individual gains in earnings by seamen have already been described. The overall picture must also be considered, as set forth in the following "Trend in Monthly Wage Costs for a Typical United States-Flag C-2 Type Vessel:"[17]

	1937		1952		Per cent
	Dollars	Per cent	Dollars	Per cent	Increase
Base wages	$4,543	91.0	$15,736	65.2	246
Overtime	432	8.6	6,264	25.9	1,350
Fringe items ...	20	0.4	2,152	8.9	10,660
	$4,995	100.0	$24,152	100.0	384

(17) *Maritime Subsidy Policy*, April 1954, a Review of Maritime Subsidy Policy in the light of present national requirement for a Merchant Marine and a Ship Building Industry. Report prepared by the Office of the Under Secretary of Commerce for Transportation and the Maritime Administration, page 52.

The comprehensive study of "Maritime Subsidy Policy" issued by the Department of Commerce in 1954 points out that since the end of World War II, the actual number of competitive foreign flags encountered by the American operators had increased to the point where in 1951 there were approximately 27 substantially competitive foreign-flags. Among these the competition offered by the fleets of Japan and Germany were even then assuming their pre-war importance. The following table[18] provides typical examples of the wage differences between United States-flag vessels and foreign-flag vessels in competition on certain trade routes:

"Representative Monthly Wage Costs by Flag of Operator on Typical Trade Routes

Flag of Registry	Nominal Trade Route Designation				
	A	B	C	D	E
United States	$23,000	$25,000	$20,000	$20,000	$18,000
Danish	6,400	—	—	—	—
Chilean	9,400	—	—	—	—
Norwegian	—	5,500	5,200	—	5,300
Belgian	—	—	8,300	—	—
United Kingdom	—	—	4,700	—	5,000
Greek	—	—	—	6,300	—
Italian	—	—	—	6,500	—
Spanish	—	—	—	5,300	—
Netherlands	—	—	—	—	7,600
Union of South Africa	—	—	—	—	6,000"

It is also pointed out in "Maritime Subsidy Policy" that, after taking into consideration all factors concerned

(18) *Maritime Subsidy Policy, supra*, page 54. The report adds: "Japanese wage costs, despite their relatively high manning requirements, are the lowest encountered by United States-flag vessels. In 1951 ships of United States-flag registry operating in competition with Japanese ships paid wages which averaged $21,700 per month in contrast to Japanese payments of $2,900 per month."

with total labor costs, as compared with direct wage costs, the averages of composite weighted differentials between United States and foreign costs in 1951 were approximately 71%.

The plight of domestic shipping, represented by the coastal and intercoastal lines, is even more drastic in spite of the fact that it is not faced with foreign competition. Domestic shipping has had to absorb all the increases in costs of ship operation and has not been able to maintain a profitable rate structure in competition with other forms of transportation.

III

The Government and the Merchant Marine.

In 1936 Congress established a policy that the United States should have and should aid a privately operated merchant marine.[19] The method of carrying out this policy has been criticized, but there has never been any serious opposition to the policy itself.[20] Instead, it has become more and more apparent that there is a steadily increasing need for more and more governmental interven-

(19) Merchant Marine Act, 1936, 46 U.S.C. 1101.

(20) *Survey, The American Merchant Marine Policies and Problems*, a report of the House Committee on Merchant Marine and Fisheries, 83rd Cong., 2d Sess. 1954; *Maritime Subsidy Policy, supra; American Merchant Marine and the Federal Tax Policy*, Report to the President on Governmental Assistance Necessary to Maintain a Merchant Marine Adequate to the Commercial and National Defense Requirements of the United States, submitted by the Secretary of Commerce, 1952; *Analysis of Construction and Operating Subsidies under the Merchant Marine Act, 1936, as amended*, with minority report, submitted by The Ocean Shipping Panel to The Transportation Council for the Department of Commerce (1953); Budget Message to Congress of the President, January 17, 1955.

tion in the shipping situation. Both Congress and the Executive Department are aware of the difficulties and there is a constant process of review.[21]

It is obvious, therefore, that the interplay of the needs of the industry and the ability and desire of the government to satisfy such needs necessarily requires consideration of the entire relationship of employer-employee-government. No one factor can be treated without determining its overall effect. For example, during the last year the Administration, in an ill-conceived economy move, considered the advisability of acting under executive order and legislation to terminate the traditional marine hospitalization accorded seamen. Such action would have had industry-wide repercussions, and would have required a complete review of the rights of seamen, the liability of employers and the proper shift of the cost of hospitalization and treatment.

Similarly, any development of government assistance under the Merchant Marine Act, 1936, or otherwise, must take into account the cost of the responsibility for personal injuries to employees imposed upon the ship oper-

(21) The Chairman of the Committee on the Merchant Marine and Fisheries has recently announced an exhaustive study of labor and other operational costs, and of the present need for government aid to shipping; in his Budget Message to Congress, January 17, 1955, President Eisenhower stated:

"Payment of subsidies to American ship operators to offset lower operating costs of foreign ships will require appropriations estimated at 115 million dollars in 1956. The rapid rise recently in expenditures for this purpose and the possibility of continued increases make it important to provide more effective budgetary control over the level of subsidized operations. I am, therefore, proposing in this budget to establish a limitation on new long-term contracts to pay operating-differential subsidies. Such a limitation will permit annual review by the President and the Congress of the extent of our future subsidy commitments."

ator. Although the Maritime Administration has not yet established a subsidy differential for the cost of protection and indemnity insurance, it is expected that American costs on the average will be approximately 50% heavier than foreign costs.

Of course it is not argued that a decision in the instant case will so profoundly affect costs as to become, in itself, a vital factor in ship operation or in the relationship between the employer and the government. Nevertheless, it is impossible to divorce one decision of this Court from hundreds of others which will follow here and in the lower courts. The continuous extension of liability for personal injuries and the concurrent increase in the cost of P&I insurance could loom large enough to be a factor in determining whether or not operation under a foreign flag is desirable.

Accordingly, the Supreme Court must take into consideration the overall effect of its rulings. In the past this Court has indicated a strong preference for a workmen's compensation system which would replace the judicially imposed "insured liability", but, in broadening the liability of the ship operator, the Court has effectively prevented legislative action. The review of "Workmen's Compensation Versus Employers' Liability"[22] concludes by saying:

> "Despite these findings and the historical trend toward workmen's compensation, no such system has been made applicable to seamen to date, and perhaps none will ever be. The reason is obvious: the employees themselves do not want it. This situation, the opposite of that in nearly every other industry, points up the fact that seamen, once so badly treated and so lacking in legal remedies to

(22) *Ocean Transportation, supra*, Chapter 16, page 324.

> protect them, now enjoy a position just the reverse of that of a few years ago. Instead of having remedies generally inferior to those of other industrial workers, seamen now have remedies so superior to those applicable to their fellow workers that they resist any effort to reduce their status to the common level. Since the days before World I, the merchant seaman has come a long way."

A substantially similar conclusion appears in "Seamen, Seaworthiness, and the Rights of Harbor Workers"[23] where, in discussing the merits of judicial creation of a favored group of workers, it was said:

> "* * * Disregarding the question which history raises concerning the suitability of the judicial process for performance of the legislative function, the substantially important question remains whether the Supreme Court regards its quasi legislative determinations in the maritime field as within the doctrine of *stare decisis* or whether they are, like true legislative determinations, subject to continuing review, modification, reopening, amendment and repeal."

It is clear that the issue of the extension of liability of ship operators cannot be treated in a vacuum without consideration of many other related factors. The Court may wish to conclude as it has in the past that:

> "The legislative process is peculiarly adapted to determine which of the many solutions to this problem would be most beneficial in the long run." *Halcyon Lines* v. *Haenn Ship Ceiling and Refitting Corp.*, 342 U. S. 282, 286 (1952).

(23) 39 Cornell L. Q. 381, 402 (1954).

Conclusion

The American seaman is no longer the underprivileged worker of the past whose only recourse in many instances was to the Admiralty Courts. Instead we now find the seaman to be one of the most highly favored workers in America, receiving compensation and other benefits equal to or better than those in other industries.

The seaman, through collective bargaining, has been able to wield his newly developed economic power in such a way as drastically to affect shipping operations and costs, and even to control many of the practices involved in his employment which were formerly left to the courts or legislature.

At the same time, all the factors creating a high cost of operation have placed the shipping industry itself in such condition that continued existence under the American flag for a most important segment of the industry depends upon some form of government assistance.

In this situation, the determination of the advisability of extending a further benefit to seamen or of broadening the responsibility of a ship operator cannot be divorced from other important considerations. The fixing of the legitimate costs of operation, including the extent of the protection needed by and which should be furnished the employees and the share the government must bear, is a legislative function which should be accomplished only upon full consideration of all current facts and the necessary interplay of governmental policies. The decision should not be made in the judicial forum.

In the context of the foregoing economic picture, it is submitted that wisdom dictates that the philosophy inherent in the decision of the Court of Appeals should be accepted. The facts here are peculiarly appropriate for application of the often neglected doctrine of judicial self-limitation.

It is respectfully submitted, therefore, that the decision of the Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

JOHN J. BURNS,
Counsel for Amicus Curiae,
40 Wall Street,
New York 5, New York.

ALBERT E. RICE,
BURNS, CURRIE, RICH & RICE,
Of Counsel.

Certificate

I, JOHN J. BURNS, Counsel for the American Merchant Marine Institute, Inc., *amicus curiae*, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 24th day of January, 1955 I served copies of the foregoing Brief on counsel for all parties of record by mailing copies to their offices in duly addressed envelopes with air mail postage prepaid

JOHN J. BURNS